Supreme Court, U.S.
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93-955
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOHN S. BEESON, ET AL., Petitioners

v

PHILLIPS, KING AND SMITH, ET AL, Respondents

AND

RESOLUTION TRUST CORPORATION, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1. Whether Petitioner John S. Beeson suffered a "legal injury" on September 30, 1986, when he obtained a loan to buy the shares of stock of some of the other investors in Lincoln Savings & Loan of Miami, Florida, so as to begin the running of the Texas two year Statute of Limitations against him on his malpractice claims against the Respondents Phillips, King and Smith, et al (i.e., Law Firm).

2. Whether the claims of Petitioners John S. Beeson and Lynn Foster against First South Savings Association (First South) as set out in a suit filed in the State District Court of Harris County, Texas prior to the Federal Savings and Loan Insurance Corporation being appointed conservator of First South were records of First South so as to permit Petitioners to assert their defenses of fraudulent inducement against the Respondent Resolution Trust

Corporation on promissory notes executed by Petitioners and payable to First South if such notes were non-negotiable.

PARTIES

PETITIONERS

John S. Beeson

Lynn Foster

RESPONDENTS

Phillips, King & Smith

Phillips, King, Smith & Levi

Phillips, King, Smith & Wright, Inc.

Phillips, King, Smith & Wright, P.C.

Smith, Wright & Weed, P.C.

Charles E. Harrell

Anthony W. Nims

Harold L. Levi

E. Ashley Smith and E. Ashley Smith, P.C.

C. Lee Crawley

C. L. Crawley, Jr., P.C.

William E. King

G. Christopher Scruggs

Robert L. Johnson, III

Thomas H. Weed

W. David Blunk, Jr. (David W. Blunk, Jr.)

First South Savings Association - In Receivership

Resolution Trust Corporation ("RTC")

OTHER PARTIES IN THE COURT OF APPEALS WHO HAVE NO INTEREST IN THE OUTCOME OF THIS PETITION

Robert L. Randolph

Bob M. Johnson

Mickey D. Altman

Dennis R. Ranzau

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OPINIONS BELOW

The July 19, 1993 Opinion of the Court of Appeals for the Fifth Circuit, whose Judgment is herein sought to be reviewed, is reported at 995 F.2d 611 and is reprinted in the Appendix to this Petition at "A". The prior Opinion of the United District Court for the Southern District of Texas dated April 27, 1992, is reprinted in the Appendix at "B".

STATEMENT OF JURISDICTION

The Judgement of the Court of Appeals was entered July 19, 1992. On September 15, 1992, the Court of Appeals denied a Petition for Rehearing. This Denial of Rehearing is reprinted in the Appendix at "C". The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 16.003 (a) of the Texas Civil Practice And Remedies Code which provides as

follows:

> "A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues."

This is the Texas statute of limitations governing the time within which a cause of action for legal malpractice can be brought.

STATEMENT OF THE CASE

The United States District Court for the Southern District of Texas had jurisdiction over this case under 28 U.S.C. § 1331.

Petitioner John S. Beeson will be referred to herein

as "Beeson".

Petitioner Lynn Foster will be referred to herein as "Foster".

Petitioner Lynn Foster, and the non-petitioning Robert L. Randolph, Bob M. Johnson, M. D. Altman and Dennis Ranzau will be referred to herein, as they were in the Opinion of the United States Court of Appeals for the Fifth Circuit, inclusively and collectively as the "Five Investors".

The term "Law Firm" as used herein inconclusively and collectively refers to Phillips, King & Smith, Attorneys at Law; Phillips, King, Smith and Levi, Attorneys at Law; Phillips, King, Smith and Wright, Inc., Attorneys at Law; Phillips, King, Smith and Wright, P.C., Attorneys at Law; Smith, Wright and Weed, P.C., Attorneys at Law; Charles E. Harrell; Anthony W. Nims; Harold E. Levi; C. Lee Crawley; C. L. Crawley, Jr., P.C.; William E. King; G. Christopher Scruggs; E. Ashley Smith; E. Ashley Smith,

P.C.; Robert L. Johnson, III; Thomas H. Weed; and David W. Blunk, Jr.

Lincoln Savings & Loan Associates will be referred to herein as "Lincoln".

First South Savings Association will be referred to herein as "First South".

The Federal Savings and Loan Insurance Corporation will be referred to herein as "FSLIC".

The Federal Deposit Insurance Corporation will be referred to herein as "FDIC".

The Resolution Trust Corporation will be referred to herein as "RTC".

Lincoln was a Federally insured savings association located in Miami, Florida. First South was a Federally insured savings association located in Port Neches, Texas with a branch office located in Houston, Texas. From at least 1985 and extending through June of 1987, various law firms with a number of common partners, including Phillips

served as First South's primary legal counsel. Phillips also served as Chairman of the Board of First South from 1982 until July of 1987 during which period of time he was a Director and a managing Officer of First South. From at least 1985 until his resignation from the Board in 1987, Phillips was also the majority stockholder in First South.

In early 1984, Beeson entered into an agreement with two other individuals to purchase controlling shares of Lincoln. The Law Firm represented this original group of investors. The other two individuals withdrew and another group of approximately 13 investors, including Beeson and the Five Investors, began to proceed with the acquisition of Lincoln stock. This was still in 1984. The Law Firm agreed to continue to represent Beeson and the other investors in the acquisition of Lincoln.

On January 5, 1985, First South made loans to Beeson, Foster, Johnson and Randolph and some of the other investors for the purchase of Lincoln stock. These

loans were secured primarily by shares of common stock in Lincoln. Altman and Ranzau did not purchase their Lincoln stock until December, 1986, but did purchase it with loans from First South secured by shares of Lincoln stock.

On January 7, 1985, Beeson, three of the five investors (excluding Altman and Ranzau who did not purchase their stock in Lincoln until December, 1985) and the other investors purchased a controlling share of Lincoln stock. The Law Firm represented Beeson, three of the Five Investors and the other investors during this acquisition.

In August of 1985, the Federal Home Loan Bank Board began an investigation of Lincoln, and the examiner asserted that Beeson and several of the other investors in Lincoln had acted in concert to purchase Lincoln stock. Beeson consulted the Law Firm about the acting in concert problem and it was decided that he should attempt to buy the stock of some of the other investors to resolve the acting in concert issue. On September 30, 1986, as part of

the stock buy-out plan Beeson obtained an extension and renewal of his original loan from First South in the amount of $2,576,000.00 and First South granted Beeson a new loan of $689,295.50 to purchase the stock of some of the other investors. These loans were secured by 237,210 shares of Lincoln stock and by Beeson's interest in certain real properties.

In 1987, the Federal Home Loan Bank Board, apparently not satisfied with Beeson's buy out of the stock of certain other investors, required Beeson and the Five Investors to withdraw from any participation in the operations of Lincoln.

On January 31, 1989, First South filed suits against the Five Investors in various State District Courts of Harris County, Texas, seeking recovery on the Promissory Notes executed by them and payable to First South. On February 8, 1989, the Five Investors, as well as Beeson, as co-Plaintiffs, filed a separate suit in the State District Court of

Harris County, Texas, seeking cancellation of each of their Promissory Notes as well as damages against First South. In this same action Beeson and the Five Investors sued the Law Firm for negligence and fraud. First South was served with Plaintiff's suit on February 21, 1989.

On March 16, 1989, the Federal Home Loan Bank Board appointed the FSLIC as Conservator of First South. The FSLIC removed all six law suits from the Harris County District Courts to the United States District Court for the Southern District Court of Texas which consolidated them on August 10, 1989. The five law suits filed by First South were consolidated into the suit originally filed by Beeson and the Five Investors where it was docketed as C.A. H-89-1302.

In their Second Amended Complaint, Beeson, et al (Beeson and the Five Investors) asserted that various acts on the part of First South and the Law Firm constituted erroneous advice, negligence, bad faith and fraud in their

dealings with the Petitioners in connection with Petitioners purchase of Lincoln stock and that First South and the Law Firm were acting in concert. Petitioners further contended that as a result of the negligent actions, bad faith and intentionally fraudulent conduct in regard to handling the change of control of Lincoln, the Petitioners, as well as other purchasers of Lincoln stock, were required by the Bank Board to remove themselves from control and operation of Lincoln. This in turn prevented Petitioners, and the other investors, from infusing additional capital into Lincoln and from using their expertise and knowledge in real estate, real estate lending and real estate development to further the business interests and financial success of Lincoln. Petitioners asserted that as a result of their being forced by the Bank Board to relinquish control of Lincoln and to no longer participate in its operations Lincoln failed and was taken over by the FSLIC in 1989.

By their Second Amended Complaint, Petitioners

sought cancellation of their Promissory Notes made payable to Lincoln or, alternatively, judgment against all the Defendants in an amount equal to the original principal amount of each of Petitioners' Promissory Notes together with all accrued interest and penalties. Petitioners further sought judgment against First South and the Law Firm Defendants for loss of profit each would have made on his investment in Lincoln. Petitioners also sought judgment against First South and the Law Firm Defendants for prejudgment interest, postjudgment interest, costs and attorneys' fees.

On August 9, 1989, the provisions for the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) became effective, and the RTC succeeded to the rights and powers of the FSLIC and became Receiver for First South.

In September, 1991, the Law Firm filed Motions For Summary Judgment against the Plaintiffs and against the

RTC.

By Final Judgment signed April 27, 1992, Judge Norman W. Black of the United States District Court For the Southern District of Texas, Houston Division:

1. Dismissed the Petitioners claims against the Law Firm;
2. Dismissed the claims of the RTC against the Law Firm;
3. Granted the RTC Judgment against the Petitioners on their respective Promissory Notes together with accrued interest and post judgment interest;
4. Awarded the RTC attorneys' fees against the Petitioners;
5. Awarded the RTC attorneys' fees against the Petitioners if the appeal of the Final Judgment did not prevail;
6. Dismissed With Prejudice the Petitioners claims against the RTC and First South.

Also on April 27, 1992, Judge Black signed an Order setting out his reasons for Granting a Final Judgment *as he did. (Appendix* "B")

Beeson, the Five Investors, and the RTC appealed the District Court Judgment to the United States Court of Appeals for the Fifth Circuit (Court of Appeals). In a decision dated July 19, 1993, (Appendix "A") the Court of Appeals affirmed the grant of the District Court's Judgment in favor of the RTC on the Promissory Notes of Beeson and Foster (prior to the decision of the Court of Appeals, the RTC had sold the Randolph, Johnson, Altman and Ranzau Notes to a third party and a settlement was reached between this third party and those four appellants) and affirmed the grant of the Summary Judgment against Beeson on his malpractice claim on the basis that it was barred by limitations. The Court of Appeals vacated the Summary Judgment against Foster, Johnson, Randolph, Ranzau and Altman on their malpractice claims against the Law Firm

and remanded for further proceedings. Beeson petitions for Writ of Certiorari to the Court of Appeals because of it's holding that his malpractice claim against the Law Firm Defendants was barred by the statute of limitations. Beeson and Foster petition for a Writ of Certiorari to the Court of Appeals because of it's decision that their defenses against the RTC's claims on their Promissory Notes payable to First South were not supportable.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted because the Court of Appeals by affirming the Summary Judgment in favor of the Law Firm against Beeson sanctioned the action of the District Court in granting such Summary Judgment by holding in favor of the Law Firm on an issue on which it bears the burden of proof and on

which there was absolutely no evidence.

The Court of Appeals correctly held that "...Texas Law imposes two requirements for the accrual of a legal malpractice cause of action: (1) the commission of a tortious act and (2) the suffering of a legal injury." ***Randolph, et al v. Resolution Trust Corp.***, 995 F.2d 611 (5th Cir. 1993) at 617. However, it is submitted that the Court of Appeals was in error in holding that in September, 1986, when Beeson borrowed additional monies from First South to buy out the Lincoln shares from two of the other investors, he suffered a legal injury that commenced the running of the two year statute of limitations. The Court of Appeals cites no authority for its holding on this point. ***Randolph***, 995 F.2d 611 at 618.

It is unclear from the Opinion of the Court of Appeals whether it considers Beeson's purchase of the stock of two of the other investors, his borrowing money to purchase such stock, or both, to constitute a legal injury

commencing the running of the statute of limitations. The Court of Appeals does take note of Beeson's position that had it not been for the Law Firm's malpractice this stock buy out might have been advantageous to him. However the Court of Appeals states "...but Beeson went further into debt and purchased stock in an attempt to rectify a problem allegedly caused by the firm's malpractice." ***Randolph***, 995 F.2 618. The Court of Appeals is looking at this transaction with hindsight. What if this purchase by Beeson of the two other investors' shares in Lincoln had satisfied the Federal Home Loan Bank Board and Beeson and the other investors had retained control of Lincoln?

There is simply no summary judgment evidence in the record that at the time Beeson purchased these shares of stock he suffered any legal injury. There is no summary judgment evidence in the record establishing that Beeson paid more than the then market value for the shares of stock. Even if it was apparent at the time Beeson purchased

the stock of two of the other investors that he would in the future sustain damages as a result of such purchase the statue of limitations would not begin to run at the time of the purchase. ***Atkins v. Crosland,*** 417 S.W.2d 150 (Tex. 1967). In it's opinion below, the Court of Appeals accepts that this is the holding in ***Atkins***. ***Randolph***, 995 F.2d at 611 at 619. However, the Court seems to consider the additional loan for the purchase of the stock a legal injury.

What if Beeson, however misguidedly, decided to purchase other investors stock in September, 1986, completely apart from any consideration of the acting in concert problem. Would the statute of limitations against him on his malpractice claims then begin to have run? It is submitted that it would not.

The Movant in a Motion For Summary Judgment proceeding bears the burden to establish that there is no genuine issue of material fact on any issue on which ***it*** bears the burden of proof. **Federal Rules of Civil**

Procedure, Rule 56; ***Celotex Corp. v. Catrett,*** 477 U.S. 317, at 323-327; ***Howell Hydrocarbons, Inc. v. Adams,*** 879 F.2d 183, 191 (5th Cir. 1990). A Statute of Limitations is an affirmative defense which must be pled by the party asserting it and on which such party has the burden of proof. ***Woods v. William M. Mercer, Inc.***, 769 S.W.2d 515, 517 (Tex. 1988); ***Metal Structures Corp. v. Plaines Textiles, Inc.***, 473 S.W.2d 93 (Tex.Civ.App.-Amarillo 1971, no writ) FRCP, Rule 8 (c),Tex.R.C. Proc. Rule 94. The Law Firm had the burden on their Motion For Summary Judgment to establish that there was no genuine issue of material fact as to the running of the applicable statute of limitations.

The Court of Appeals, in vacating the Summary Judgment against the Five Investors on their malpractice claims and remanding to the District Court for further proceeding to determine if such Five Investors suffered any legal injury prior to the critical date for limitations

purposes, states "In making this determination, the District Court should carefully consider the holding in ***Atkins***." ***Randolph***, 995 F.2d 611 at 619. Petitioners certainly concur with this statement by the Court of Appeals.

Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967) was an action by the Plaintiff Atkins against Defendant Crosland, an accountant. The Texas Supreme Court stated in the Opinion that the "...question for decision is: Did the trial court error in granting Defendant's motion for summary judgment based on the ground that Plaintiff's cause of action was filed more than two years after December 31, 1960." p.151. Beginning with the tax year 1958 the Defendant prepared Plaintiff's income tax returns relying on the cash receipts and disbursements method of accounting rather than the accrual method for the tax years 1958 and 1959. In 1960, the Defendant utilized the accrual method of accounting but failed to secure the consent of the Commissioner of Internal Revenue with the result that the

Commissioner required the Plaintiff to retain the cash method for 1960 thereby depriving him of a tax savings of $12,297.32. On October 20, 1961, less than two years prior to the institution of the suit, the Commissioner assessed the Plaintiff with a tax deficiency in this amount. The acts of negligence relied upon by the Plaintiff were in the Defendant's originally adopting the cash method (1958); in failing to obtain the Commissioner's permission to change from the cash method to the accrual method (1960); and in failing to warn Plaintiff to pay off his accounts payable prior to the end of the 1960 tax year (1960). Plaintiff brought suit against Defendant on September 30, 1963, more than two years *after* each of these acts relied on by Plaintiff. In holding that none of these three acts were a "legal injury" which would commence the running of limitations, the Court states:

> "We must first determine when the plaintiff's cause of action accrued, for it is at that time that the two year statute of limitations began

to run. Article 5526, Vernon's Annotated Civil Statutes. The plaintiff argues that the statute did not begin to run until the tax deficiency was assessed by the Internal Revenue Service, i.e., only at that time was the tort complained of completed. We agree with this contention.

***

"A legal injury must be sustained, of course, before a cause of action arises. It is said in 34 Am. Jur. Limitations of Actions § 160, p. 126:

> 'As regards the running of the statute of limitations applicable to torts, a cause of action accrues only when the force wrongfully put in motion produces the injury, the invasion of personal or property rights accruing at that time.' (citing the Quinn Case, supra.)

"And see *Houston-American Finance Corp. v. Travis*, 343 S.W.2d 323 (Tex.Civ.App. 1960, writ Ref'd n.r.e.). A helpful and often quoted test for determining when the cause of action accrues is found in 54 C.J.S. Limitations of Actions § 168, p. 122-123:

> "The test to determine when the statute of limitations

> begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury, that is, an injury giving rise to a cause of action because it is an invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from, and consequent on, the act, the cause of action accrues, and the statute begins to run, when and only when, the damages are sustained; and this is true although at the time the act is done it is apparent that injury will inevitably result.'" (emphasis supplied) p. 152-153.

Beeson's position is that he first suffered damage from the Law Firm's malpractice when the Federal Home Loan Bank Board required him, and the other investors, to withdraw from any active participation in Lincoln which was subsequent to February 8, 1987.

II.

Certiorari should be granted because the Court of Appeals declined to decide the question of negotiability of Petitioners' Promissory Notes because the Petitioners' State court lawsuit was not a "record of the bank" when the FDIC took over First South based upon *Langley v. FDIC*, 484 U.S. 86 (1987). *Langley* did not decide this and it is an important question of Federal law which should be decided by this Court.

1. **The Petitioners' Promissory Notes to First South are non-negotiable and thus the RTC is not a holder in due course.**

Petitioners' Notes payable to First South provides for a variable rate of interest as follows:

a. The Beeson, September 30, 1986, $2,576,000.00 Note provides:

"and to pay interest thereon from date until maturity at a per annum rate (determined on a daily basis, the first such determination being made on the date the holder of this Note advances any portion of the principal of this Note, and subsequent determinations being made on the date upon which a change in such rate occurs) equal to the lesser of (i) or (ii) as follows:

"(i) The sum of two percent (2.00%) per annum plus the "Prime Interest Rate", as such term is hereinafter defined (the "Applicable Rate"); or

"(ii) The maximum lawful rate of interest permitted to be charged by the holder of this Note to Maker under the laws of the State of Texas or the United States of America (whichever is higher) and further limited by the provisions of this Note hereinafter set forth, which provisions control the calculation of interest to be charged on the loan evidenced by this Note (the "Maximum Rate");

* * *

"The term "Prime Interest Rate," as used herein, means the rate of interest announced by ALLIED BANK OF TEXAS, Houston, Texas, or its successors, as its prime rate, regardless of whether such rate of interest is based upon any particular type of loans or borrowers or any one or more other factors or reasons and whether or not any notice is given or announced concerning

such rate of interest or any change thereof, and whether such rate is denominated as its prime rate, its base rate or some similar designation; further provided, that in the event that any such rate shall no longer be available from Allied Bank of Texas for whatever reason, the holder hereof may use the Prime Interest Rate, as defined above, of any other banking institution in Harris County, Texas." (Emphasis supplied) (Record, Beeson Note, p. 771)

The Beeson, September 30, 1986, $689,295.50 Note contains the same wording as the Beeson $2,576,000.00 Note.

b. The Foster, January 5, 1985, $171,113.20 Note provides:

"All capitalized terms which are used but not defined in this Note shall have the same meaning as in the Loan Agreement dated as of even date herewith between the Borrower and FSSA (such Loan Agreement together with all amendments or supplements thereto, being the "Loan Agreement"). (emphasis supplied)

"In addition to the principal sum referred to in the first paragraph of this Note, the Borrower also agrees to pay interest on all amounts hereof so advanced and remaining from time to time unpaid hereon from the date hereof until maturity at a varying rate per annum which is

> two percent (2%) (the "Margin Percentage") plus the Prime Rate, but in no event to exceed the Highest Lawful Rate. Past due principal and interest shall bear interest at the Highest Lawful Rate, provided however, if no Highest Lawful Rate is applicable then at a varying rate per annum which is six percent (6%) above the Prime Rate. Adjustments in the varying interest rate shall be made on the same day as each change announced in the Prime Rate and, to the extent allowed by law, on the effective date of any change in the Highest Lawful Rate."

On April 10, 1991, in ***Ackerman v. Federal Deposit Insurance Corp.*** 930 F.2d 3 (5th Cir. 1991) the Court of Appeals certified to the Supreme Court of Texas the question of whether or not a particular variable rate interest note was non-negotiable because of the variable rate interest provided in such note. In ***Ackerman***, (which in the subsequent opinion of the Texas Supreme Court becomes ***Amberboy v. Societe de Banque Privee et al***) the appellants contended that the appellee was not a holder in due course of the notes because the interest rate could be calculated only by reference to a source outside the note itself, such

source being in ***Ackerman*** the lender's (payee's) published prime rate of interest.

The questions certified to the Texas Supreme Court by ***Ackerman*** was "Is a promissory note requiring interest to be charged at a rate that can be determined only by reference to a bank's published prime rate a negotiable instrument as defined by the Texas Uniform Commercial Code?" (Emphasis supplied)

In answering this certified question the Texas Supreme Court in ***Amberboy v. Societe de Banque Privee et al***, 831 S.W.2d 793 (Tex. 1992) held that the lending institution's prime rate of interest, used as a basis for a variable rate of interest in the note, did not render the note non-negotiable. Keeping in mind the facts stated in ***Ackerman*** as certified to the Texas Supreme Court, i.e., that the variable rate of interest there was based on the lender's prime rate, the Texas Supreme Court held that such facts did not render the note in ***Ackerman*** non-negotiable. In a five to four decision

the Texas Supreme Court, with four Justices rather vehemently expressing their opinion that even this limited variable rate of interest note was non-negotiable, made the following statements:

> "It is our task to construe the U.C.C.'s 'four corners' rule for determining whether the sum certain requirement is met. For an instrument to be negotiable under that rule, the sum certain to be paid must be capable of computation 'from the instrument itself without reference to any outside source...." Tex. Bus. & Com. Code Ann. Sec. 3.106, comment 1 (Vernon 1968). (Emphasis supplied) p. 794

* * * * *

> "A VRN which contains provision for interest to be paid at a variable rate that is readily ascertainable by reference to a bank's published prime rate is compatible with the Code's objective of commercial certainty. The Code does not require 'mathematical certainty' but only commercial certainty." ***
> "Commercial certainty serves the purpose of the law of negotiable instruments, which is to make the instrument the functional equivalent of money." ***
> "If the rate of interest to be paid under the instrument is readily ascertainable by reference to a bank's published prime rate, this purpose is achieved." (Emphasis supplied) p. 796

* * * * *

"Therefore, in response to the question certified to us by the United States Court of Appeals for the Fifth Circuit we reply that a promissory note requiring interest to be charged at a rate than can be determined only by reference to a bank's published prime rate is a negotiable instrument as defined by the Texas Uniform Commercial Code. By a 'bank's published prime rate,' we intend our answer to include only those rates which are public, either known to or readily ascertainable by any interested person. See Black's Law Dictionary 1233 (6th ed. 1990) We do not however, specify or limit the manner in which the rate must be published. The requirement of commercial certainty is satisfied when the information is readily available to the public, regardless of the means utilized to make that information available." (Emphasis supplied) p. 797-798

From the above quotations from the five member majority of the Texas Supreme Court, and considering the facts of the ***Amberboy*** case, i.e. that the note therein had a variable rate of interest determined by the lender's own prime rate of interest, it would seem evident that the majority in ***Amberboy*** merely held that:

1. The note is not rendered non-negotiable by the fact that it contains a variable rate of interest determined by the lender's own prime rate of interest,and

2. That the prime rate of interest determining the variable rate of interest of the note must be "published" at least to the extent that any person "interested" in the note would be able to determine not only the interest accrued on the note but interest that would accrue in the future should such "interested person" become, or attempt to become, a holder in due course of the note.

Referring back to the variable rates of interest set out, supra, in the Petitioners' Notes to First South they are in no way negotiable under the restricted criteria established by the majority opinion in ***Amberboy***.

The variable rate interest in the two Beeson notes provide, basically, as follows:

A. Determined on a daily basis it is to be the lesser of the maximum rate allowed to be charged by the holder under the laws of the State of Texas or of the United States (whichever is higher) or

B. The following:

1) The interest rate is based on the prime rate plus two percent of Allied Bank of Houston or its successors;

2) whether or not Allied Bank of Houston gives any notice or announcement of its prime rate or any change thereof; and

3) in the event that the prime rate of Allied is no longer available for whatever reason the holder of the note may use, in determining the interest rate, the prime interest rate of any other banking institution in Harris County, Texas.

With regard to the Beeson Notes, considered in light of the holding of the majority in ***Amberboy***, first, it can be determined on a daily basis being the lesser of the maximum rate allowed to be charged by the State or the United States, (whichever is higher) or, second a prime rate plus (1) not based on the lender's own prime rate but based on the prime rate of another lending institution (Allied) or

its successors; (2) the Allied prime rate is the basis for the variable rate of interest in the Beeson Notes even though the notes state that the Allied prime rate controls whether or not Allied gives any notice or announcement of its prime rate or any change thereof; (even though the majority in ***Amberboy*** would not commit themselves to specifically defining what a bank's published "prime rate" was, ***Amberboy*** was concerned only with the lender's prime rate and did state "... we intend our answers to include only those rates which are public, either known to or readily ascertainable by any interested person;") and (3) the Beeson Notes provide that in determining the variable rate of interest, if the prime rate of Allied is no longer available "for whatever reason", the holder of the note may use, in determining the interest rate on the note, the prime rate of any other banking institution in Harris County, Texas. This is hardly the "sum certain" required to make an instrument negotiable.

The Foster Note purports to establish an interest rate of two percent above the prime rate. However, this Note does not even refer to what the prime rate is other than stating that "Prime Rate" (which is a capitalized term) is a "capitalized term" used, but not defined, in the Note which shall have the same meanings as the Loan Agreement dated as of the even date herewith between the borrower and FSSA (First South). How could the "interested person" referred to in ***Amberboy*** in any way determine the rate of interest the Foster Note bears when reference must be made to a separate and distinct agreement between the borrower and the lender?

The Plaintiffs again respectfully call the Court's attention to the narrowly limited facts of the ***Amberboy*** case (a variable interest rate note based on the prime rate of the lender) and the above quotations of the five member majority opinion of the Texas Supreme Court in answering this Court's certified question. This majority points out in

Amberboy that Tex. Bus. & Com. Code Ann. Sec. 3.106 in requiring that an instrument be for a "sum certain" to be negotiable it must provide an interest rate "*** that is readily ascertainable by reference to a bank's published prime rate is compatible with the Code's objective of commercial certainty. The Code does not require 'mathematical certainty' but only commercial certainty." p. 796. Plaintiffs submit that on examination of the variable rate interest terms of any of the three Notes in question here there is not only a complete absence of commercial certainty, but no expectation by any reasonable person who might become a purchaser or assignee of the Note, to become a holder in due course. The variable rates of interest in Plaintiffs' three Notes are not variable rates. They are simply an amount of money to be charged by First South over and above the principal which amounts which cannot be determined not only by an "interested person" but by no person other than whatever person at First South

made the interest choice or, in the case of the Foster Note, was privy to the rate established by the Loan Agreement. Given this, how could one think that he or she was purchasing an obligation for a sum certain?

In ***Amberboy***, the note there considered was negotiable, so long as it is limited to what it was, in fact, limited to: 1) the variable rate of interest provided for in the note is based upon the prime rate of the lender (payee) of the note and 2) such prime rate is published. Petitioners' recognize that the Texas Supreme Court refused, because it was not required to, define what it meant by "published" prime rate. However, the Court did, Petitioners suggest, make the requirement that "published" means that any "interested person" should be able to establish not only the interest which had accrued on the note but that which might accrue in the future. It seems obvious that by "interested person" the Texas Supreme Court must have in mind a purchaser or other assignee of a variable rate interest note

who, in purchasing or otherwise becoming an assignee, would expect to be a holder in due course.

2. **Because Petitioners' Promissory Notes are non-negotiable the personal defenses asserted by them are available against the RTC**

In ***Sunbelt Savings, FSB Dallas, Texas v. Montross***, 923 F.2d 353 (5th Cir. 1991, reh'g granted), a panel of the Court of Appeals stated:

> "We do not view negotiability as a technical requirement. Negotiability is the foundation underlying all of Article Three and of holder in due course status in particular. . . . When the negotiable note is in the hands of a holder in due course, the maker is left with few defenses, thus, the instrument's value is enhanced. Non-negotiable instruments, however, are contractual obligations, which do not enjoy holder in due course protections. The makers of variable interest rate notes sign only a contractual obligation to repay their debt; they had no expectation that holder in due course doctrine would strip them of their defenses.
>
> "Extending holder in due course status to the FDIC and its successors respecting non-negotiable instruments is both unnecessary and undesirable. When the FDIC assumes control of an institution, the assets are what they are–negotiable instruments, contracts, real property,

> and so on. We agree that the FDIC should not be disadvantaged by the circumstances of its assumption of control, but this policy does not require giving the FDIC the ability to transmute lead into gold. Allowing the FDIC to transform contracts into negotiable instruments would defeat the reasonable commercial expectations of the variable interest note makers."
> p. 356-357.

In ***Sunbelt***, supra, the court held "after carefully reviewing our decisions and the policy underlying them, we decline to extend the federal holder in due course status to the FDIC or its successor in cases in which it acquires non-negotiable instruments through purchase and assumption transactions." p.356

The court in ***Sunbelt*** held that the note in question was non-negotiable because it provided for a variable rate of interest.

On May 15, 1991, the 5th Circuit in ***Sunbelt*** ordered a rehearing en banc. 932 F.2d 363 (5th Cir. 1991).

On October 9, 1991, the 5th Circuit en banc on the rehearing in ***Resolution Trust Corporation v. Montross***, 944

F.2d 227 (5th Cir. 1991) reinstated the panel opinion (923 F.2d 353) in part. In it's opinion the full Court, excepting one judge who resigned and five judges who were reclused and did not participate in the decision, stated:

> ". . . The panel opinion at 923 F.2d 353 is reinstated, except that we take no position on the effect of the variable interest rate on the negotiability of the note. The maker of the note gave other reasons for the note being non-negotiable, and the case was presented on the appeal with both parties accepting the non-negotiability of the note. Sunbelt's contention to the contrary before the en banc court comes too late. See ***Najarro v. First Federal Savings & Loan Ass'n of Nacogdoches, Texas***, 918 F.2d 513, 516 (5th Cir.1990);***Moore v. United States***, 598 F.2d 439, 441 (5th Cir. 1979).
>
> " [2] The personal defenses to which the maker is entitled must, of course, be based on documents of the savings institution at the time of its insolvency and not upon secret agreements unenforceable under ***D'Oench, Duhme & Co. v. FDIC***, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). See ***Howell v. Continental Credit Corp.***, 655 F.2d 743 (7th Cir.1981)." (Emphasis supplied)

Petitioners' personal defenses, to which they are entitled because of the non-negotiability of their Notes, are

based on documents of First South at the time of its insolvency and not upon secret agreements unenforceable under ***D'Oench,Duhme***. On February 8, 1989, all Petitioners and four of the other Five Investors filed suit in the District Court of Harris County against First South seeking cancellation of their Notes and damages. This lawsuit was served on First South on February 21, 1989. On March 16, 1989, the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation as conservator for First South. First South's Answer to the Harris County District Court lawsuit was filed prior to March 16, 1989. Thus, that lawsuit was a "document of the savings institution at the time of its insolvency . . ." See ***Montross***, en banc, supra.

In the recent case of ***Texas Refrigeration Supply v. FDIC*, 953 F.2d 975 (5th Cir. 1992, reh'r den April 2, 1992)**, this Court stated:

"[7] ***D'Oench, Duhme*** does not of itself thwart

> the assertion of rights for relief from wrongful acceleration and unreasonable sale at foreclosure. See *Garrett v. Commonwealth Mortgage Corporation of America*, 938 F.2d 591, 595 (5 Cir.1991) ('[N]either section 1823(e) nor the *D'Oench, Duhme* doctrine prevents plaintiffs from asserting claims or defenses that *do not depend on agreements*." (emphasis supplied)). We repeat, *D'Oench, Duhme* only protects the FDIC and federally created bridge banks from oral agreements that for some reason do not become part of the loan record (usually, oral agreements). p. 981

Unlike the situation in ***Langley v. FDIC***, 484 U.S. 86 (1987), cited by the Court of Appeals, the fraud committed by First South against the Petitioners, which Petitioners are asserting as a personal defense, is not a condition on repayment of the Notes, and thus an agreement within the purview of 12 U.S.C. 1823(e). First South's fraud consisted of a fraudulent concealment of facts known to First South. If Beeson and the other investors had known of these facts, they never would have consummated their purchase of the Lincoln stock. Petitioners do not claim an "agreement" by which they are excused from liability on the Notes. Also

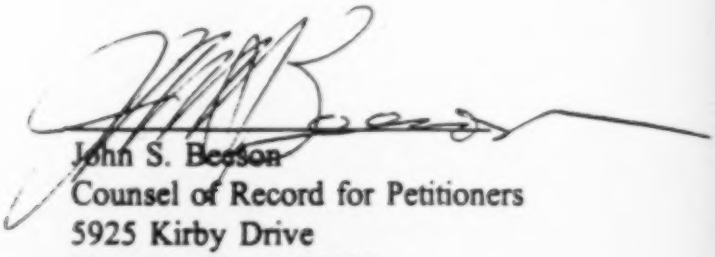
unlike the situation in ***Langley***, the Beeson and Foster Notes are non-negotiable and their lawsuit was a "record of the bank" when the FSLIC took over First South.

The District Court cites ***Kilpatrick v. Riddle***, 907 F2d 1523 (5th Cir. 1990), in support of it's Judgment, stating that the ***D'Oench, Duhme*** doctrine protects the FDIC from the effect of unrecorded agreements even if the FDIC as receiver had knowledge of the agreements. ***Kilpatrick*** involved a claim of fraud (not unrecorded agreements) by the failed bank and a claim that the FDIC had knowledge of the fraud claim when it took over the bank. However, there was no question raised in ***Kilpatrick*** as to the negotiability of the notes there involved and thus, the status or not of the FDIC as a holder in due course. Furthermore, in ***Kilpatrick*** there was nothing in the Bank's records to alert the FDIC as to the claimed fraud.

CONCLUSION

Wherefore, Petitioners respectfully pray that a Writ Of Certiorari be granted.

Respectfully submitted,



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APPENDIX "A"

OPINION BELOW OF

THE COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RANDOLPH v. RESOLUTION TRUST CORP.

Cite as 995 F.2d 611 (5th Cir. 1993)

Robert L. Randolph, et al., Plaintiff-
Counter Defendants Appellants

v.

RESOLUTION TRUST CORPORATION
As Receiver for First South Savings Association,
Defender-Counter Plaintiff Cross Plaintiff Third
Party Plaintiff Appellant-Appellee

v.

PHILLIPS, KING & SMITH, Attorneys
at Law, et al., Defendants Cross
Defendants Appellees,

v.

E. ASHLEY Smith, P.C., et al. Third
Party Defendants Appellees.

No. 92-2394

United States Court of Appeals,
Fifth Circuit.

July 19, 1993

Separate state court actions brought by bank to enforce promissory notes, by investors against bank fraud, and by investors and against law firm for malpractice were consolidated and removed to federal court when government took over as receiver of bank. The United States District Court for the Southern District of Texas, Norman W. Black, Chief Judge, entered judgment for the law firm on malpractice claims, and appeals were taken. The Court of Appeals held that: (1) investors' defenses to enforcement of notes were invalid under *D'Oench, Duhme*; (2) malpractice action of investor who tried to correct problems caused by malpractice was time barred; and (3) fact issues precluded summary

judgment on other claims.

Affirmed in part; vacated and remanded in part.[p.611]

James L. Cornell, Tammy C. Manning, Gilpin, Paxson & Bersch, Houston, TX, David R. Boyd, Joseph G. Davis, Linda A. Madrid, Washington, D.C., for RTC

Miller B. Walker, Jr., Gregory Lynn Hennig, Houston, TX, for Randolph, et al.

Daniel K. Hedges, Porter & Clements, Houston, TX, for Ashley & Smith only.

J. Preston Wrotenbery, Hirsch, Glover, Robinson & Sheiness, Houston, TX, for Phillips, King & Smith.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, DAVIS, and SMITH, Circuit Judges

PER CURIAM

I.

A.

In 1984, John Beeson entered into an agreement with two other individuals to purchase a controlling interest in Lincoln Savings & Loan ("Lincoln") in Miami, Florida. As counsel, the investors chose the firm of Phillips, King & Smith (the "Firm"). The Federal Home Loan Bank Board ("FHLBB") objected to the participation of the two individuals, and they withdrew. Beeson then collected a group of other investors,

including five of the appellants here (the Five Investors),and completed the transaction with the help of the Firm.

During this period, the Firm learned that FHLBB might raise questions about potential acting-in-concert violations involving the purchase of Lincoln. "Acting in Concert" refers to the aggregation of voting power when one or more persons, purporting to act independently, are actually acting as a group. The Firm's alleged knowledge of these potential problems was a central issue in the district court.

On January 5, 1985, First South loaned Beeson and the other investors over $5.4 million for the purchase of Lincoln. As security, Beeson pledged shares of common stock of Lincoln as well as 7.6382 acres of Texas real estate. On January 7, 1985, Beeson, the Five Investors, and several other investors purchased a controlling interest in Lincoln with the aid of the Firm.

In August 1985, the FHLBB began to investigate Lincoln, and the FHLBB examiner raised the acting-in-concert problem. Beeson consulted with the Firm regarding the issue, and the Firm decided that Beeson should buy out some of the other investors to attempt to solve the problem. On September 30, 1986, Beeson obtained from First South and extension and renewal of his earlier loan for $2,576,000 and a new loan for $689,295.50. As security, Beeson pledged 237,120 shares of Lincoln stock and his interest in two additional pieces of real estate.

In 1987, the FHLBB required Beeson and the Five Investors to withdraw from participation in Lincoln and placed Beeson's stock [p.613] in trust.[1] In June 1988, First South notified Beeson that it was accelerating his $2,576,000 note for failure to make payments on time. First South sent

notices of default to Beeson on August 4, 1988, and to other investors on January 19, 1989

B.

On January 31, 1989, First South initiated separate lawsuits against the Five Investors in the state district court. Beeson joined with the Five Investors in a separate suit against First South and the Firm on February 2, 1989, charging that the Firm and First South had fraudulently induced them to enter into the loan transactions that gave rise to the notes without disclosing their knowledge of potential regulatory problems that would arise in the stock transactions for which the funds were being borrowed. Beeson and the Five Investors (collectively, the "Plaintiffs") further contend that the fraudulent conduct caused the FHLBB to remove them from control of Lincoln, thus preventing them from infusing additional capital into Lincoln and using their expertise to save Lincoln.

On March 15, 1989, the FHLBB appointed the FSLIC conservator of First South pursuant to the Home Owners' Loan Act of 1933 and the Housing Act. Acting on behalf of the FSLIC, the Federal Deposit Insurance Corporation ("FDIC") removed all of the state court actions to federal court on April 14, 1989. With the enactment, on August 9, 1989, of the Financial Institutions Reform Recovery, and Enforcement Act of 1989, the Resolution Trust Corporation ("RTC") replaced the FSLIC as conservator of First South. The district court consolidated the actions on August 15, 1989. The RTC later was appointed receiver of First South and now litigates in that capacity. On April 27, 1992, the district court granted several motions for summary judgment;

this appeal followed.

The district court held that Beeson and the Five Investors could not succeed on their fraudulent inducement theory, as it was barred by the *D'Oench, Duhme* doctrine. See *D'Oench, Duhme & Co. v. FDIC* (1942). The district court also held that the legal malpractice actions of Beeson and the RTC were barred by the statute of limitations, while the malpractice action of the Five Investors was barred because there was no privity of contract.

II.

First, the Plaintiffs argue that the district court erred in holding that their defense of fraudulent inducement was barred by the doctrine of *D'Oench, Duhme*. While this appeal was pending, the RTC sold promissory of appellants Johnson, Randolph, Ranzau, and Altman. As to these notes, this appeal is moot. The RTC still retains three notes, however, thus requiring us to address the merits of the Plaintiff's argument.

A.

[1,2] Plaintiffs allege that their promissory notes are not negotiable because they employ a variable interest rate based upon a prime rate that is not ascertainable from the face of the note. In *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex.1992), the court held that promissory notes base upon the prime rate of an identified bank satisfied the 'sum certain' requirement thereby preserving negotiability. The court thus carved an exception of the 'four corners' rule that requires the 'sum certain' to be calculable from the

instrument itself without reference to an outside source. See TEX.BUS & COM CODE ANN § 3.106, comment 1 (Vernon 1968). The *Amberboy* decision, however, limits this narrow exception to situations where the prime rate is published or readily ascertainable by any interested person. 831.S.W.2d at 796.

[3] Here, the Plaintiffs assert that the interests rates for the various notes are not ascertainable from the face of the notes, thereby making n them nonnegotiable. We [p.614] find it unnecessary to decide whether these notes are negotiable, as the *D'Oench, Duhme* doctrine may defeat the Plaintiffs defenses to collection regardless of negotiability. See *RTC v. Montross*, 944 F.2d 227, 228 (5th Cir.1991) (per curiam) (en banc); *Park Club, Inc. v. RTC*, 967 F.2d 1053, 1055 (5th Cir. 1992). Although holder in due course status affects the types of defenses available against the RTC, these defenses still must be ascertainable from the records of the bank at the time the RTC takes control of the bank.

B.

[4] The plaintiffs argue that First South fraudulently induced them to sign the promissory notes. In *Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir.1990),cert. denied, 498 U.S. 1883, 111 S.Ct. 954, 112 L.Ed.2d 1042 (1991), we held that the claims of fraudulent inducement were barred by *D'Oench, Duhme* even if the FDIC had prior knowledge of the fraud. We find no meaningful distinction between the present case and *Kilpatrick*.

C.

[5] Plaintiffs argue that because they had filed suit prior

to the failure of First South, the FDIC had knowledge of the fraud because the pleadings in the Plaintiffs' suit were among the 'records of the bank' when the FDIC took over. We reject this argument. Past precedent indicates the term 'records of the bank' refers to the note itself or related loan documents. See *Langley v. FDIC*, 484 U.S. 86, 91-92, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987). We hold that pleadings of a lawsuit do not constitute 'records of the bank' for the purpose of applying *D'Oench, Duhme*.

As the Court stated in *Langley*, the *D'Oench, Duhme* doctrine "allow[s] federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets ... [and] ensure[s] mature consideration of unusual loan transactions ... [thereby] preventing fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." 484 U.S. at 91-92, 108 S.Ct at 401. This passage suggests that the defense to payment of the note must be based upon evidence in the bank's records, it is not sufficient that the bank's records give notice of defense.

Here, the defense is barred because, although the FDIC may have been put on notice on plaintiffs' defense, the defense itself cannot be supported by the records of the bank. Were we to hold otherwise, federal and state banking authorities would be required to speculate as to the outcome of various lawsuits pending against the bank where such outcomes depend on oral testimony of bank officials. Such uncertainty is precisely what *D'Oench, Duhme* seeks to avoid. We affirm that the district court's holding on this issue.[2]

III.

Second, the Five Investors contend that the district court erred in granting summary judgment on their legal malpractice claim against the Firm. The District court held that no attorney-client relationship existed between the Five Investors and the Firm, thus barring a legal malpractice claim, as the parties were not in privity of contract. In reviewing the judgment, we view the facts in a light most favorable to the Five Investors and engage in a *de novo* application of the law to these facts.

[6, 7] In Texas, an attorney-client relationship may be implied from the conduct of the parties. *Kotzur v. Kelly*, 791 S.W.2d 254, 257-58 (Tex.App.–Corpus Christi 1990, no writ). An attorney may be held negligent when he fails to advise a party that he is nor representing that party, when circumstances lead the party to believe that the attorney is representing him. *Id.* Because each case presents unique circumstances, we must be cautious to avoid granting summary judgment prematurely. [p.615]

In *Kotzur*, a son brought a piece of property from his father. The father hired Kelly to prepare the documents for the transaction, and Kelly represented to the parties at the closing that the property had no liens on it, other than those shown on the deed. The son later had to pay off a lien that Kelly had missed, and he sued Kelly for malpractice. In reversing a summary judgment in favor of Kelly on the privity issue, the court had stressed several facts. First, Kelly knew that the son did not a have a separate attorney, and he admitted that he had prepared documents on a "family-type" basis. Second, the son testified that it was his impression that Kelly was handling the documents and that he thought Kelly

was representing him. Third, the son noted that Kelly never had told him that he was not representing the son or that the son should retain as separate lawyer. Finally, the closing statement reflected a charge to the son for attorneys' fees.

[8] We find this case similar enough to *Katzur* that we vacate the judgment of the district court and remand. The Five Investors instructed Beeson to arrange for legal representation for himself and the other investors in connection with the Lincoln purchase. Interpreting the facts most favorably to the Five Investors, Beeson acted as their agent.

None of the Five Investors had any legal representation other than from the Firm, either in connection with the purchase of Lincoln or with the investigation by the FHLBB. When First South made the loans, some of the loan proceeds intended for the Five Investors were paid tot he Firm for legal fees. The Firm requested and obtained conflict of interest waivers from three of the Five Investors as well as from Beeson and the other original investors. The Firm also prepared option agreements to allow two of the initial investors to purchase a portion of Beeson's stock.

The evidence is sufficient to reverse the summary judgment. The Firm relies upon the Five Investors' answer to interrogatories 5 and 10, which inquired as to when each person retained the law firm and what he consulted the firm about. The answers are as follows:

5. I have never directly consulted the 'defendant attorney' ... rather the 'defendant attorney' was retained by John S. Beeson, one of the Plaintiffs herein, for the legal representation and advice in connection with the purchase by Plaintiffs and others of Lincoln Savings Association.

10. As stated above, the 'defendant attorney' was retained by

the Plaintiff John S. Beeson to represent all purchasers of Lincoln Savings Association.

Because this evidence shows that none of the Five Investors ever dealt directly with any attorney of the Firm, the firm argues that this proves that no attorney-client relationship existed. We disagree. As we noted above, the Five Investors contend that Beeson retained the Firm for himself as agent for the Five Investors. Viewing the evidence most favorably to the Five Investors, this evidence is consistent with the Five Investors' theory.[3]

[9] We also reject the Five Investors' argument that they may sue for legal malpractice even if there was no attorney-client relationship because the Firm knew that Beeson would supply the Five Investors with information. This argument has no merit. Texas courts repeatedly have held that only one in privity of contract with an attorney may maintain a legal malpractice action against him. *E.g.*, *Dickey v. Jansen*, 731 S.W.2d 581 (Tex.App.–Houston [1st Dist.] 1987, writ ref'd n.r.e).

Given our resolution of this issue, we reverse summary judgment of the Five Investors' legal malpractice claim. A material issue of fact exists as to the question of whether an attorney-client relationship existed between [p.616] the Five Investors and the Firm, but only because the Five Investors have asserted that Beeson acted as their agent in retaining the Firm. As a result, when we consider whether the legal malpractice claims are barred by the limitations, Beeson's knowledge as agent must be imputed to the Five Investors. With this background in mind, we now turn to the statute of limitations issue.

IV.

[10] Third, Beeson and the Five Investors contend that the district court erred in granting summary judgment in favor of the Firm on the ground that their legal malpractice claims were barred by Texas' two-year statute of limitations for legal malpractice claims, TEX.CIV.PRAC & REM.CODE § 16.003. Plaintiffs filed their lawsuit on February 8, 1989, making the critical date for accrual February 8, 1987.

A.

> As the Texas Supreme Court has observed, the general rule is that a cause of action sounding in tort accrues, in the absence of statute to the contrary or fraudulent concealment, when the tort is committed. This rule obtains notwithstanding the fact that the damages, or the extent, are not ascertainable until a later date ... A legal injury must be sustained, of course, before a cause of action accrues.

Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex.1967). See also *McClung v. Johnson* 620 S.W.2d 644, 646 (Tex.Civ.App.–Dallas 1981, writ ref'd n.r.e.) (cause of action sounding in tort accrues when the tort is completed, that is, the act committed and damage suffered).[4] In other words, Texas law imposes two requirements for the accrual of a legal malpractice cause of action: (1) the commission of tortious act and (2) the suffering of legal injury.

B.

[11,12] We understand the district court to have granted a

summary judgment based upon its findings regarding the "tortious act" requirement. The district court's order does not discuss the "legal injury" requirement.

We agree with the district court that no issue of material fact exists as to the first element. Beeson knew about the acting-in-concert problems long before the critical date. He had even negotiated with the FHLBB in an attempt to rectify the problem. If the Five Investors successfully prove that Beeson acted as their agent in establishing an attorney-client relationship, then Beeson's knowledge of the acting-in-concert problem also must be imputed to the Five Investors.

C.

1.

[13] the second requirement, that legal injury must have occurred, presents a more difficult problem.[5] The Firm identifies three possible legal injuries that the plaintiffs allegedly suffered prior to the critical date. First, it notes that the FHLBB began investigating Lincoln in mid-1985 regarding the acting-in-concert problem. In October 1985, the FHLBB issued its preliminary report, which concludes that Beeson and the others [p.617] acted in concert. We do not think the issuance of a preliminary report constitutes a legal injury, however, as the Firm does not cite any authority indicating that a preliminary report would allow the government to take any coercive action.

[14] At best, the filing of a preliminary report indicated that some legal injury was inevitable, but in Texas, even inevitable injury will not result in the accrual of a cause of action for the limitations purposes in Texas. In *Atkins v.*

Crosland, 417 S.W.2d 150, 153 (Tex.1967), an accountant made errors on the plaintiff's tax return in 1958 and 1960. The last tortious act occurred no later than December 31, 1960. The critical date for limitations purposes was September 30, 1961, so the two-year statute would have run by December 31, 1962; suit was not filed until September 30, 1963. On October 20, 1961, the Internal Revenue Service ("IRS") assessed a deficiency. The court held that no legal injury occurred until the IRS assessed the deficiency, quoting 54 C.J.S. Limitation of Actions § 168, at 122-23, for the following test of when a cause of action accrues:

> The test to determine when the statute of limitations begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury giving rise to a cause of action because it is an invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from, and consequent on, the act, the cause of action accrues, and the statute begins to run, when, and only when, the damages are sustained; and this is true although at the time the act is done it is apparent that the injury will inevitably result.

417 S.W.2d at 153

Applying *Atkins* to this case, we conclude that a mere investigation and preliminary report of the FHLBB does not constitute a legal injury, as the FHLBB had not yet taken any

action that invaded a right of the plaintiffs. In *Atkins*, the cause of action accrued when the deficiency was assessed, not when the audit proceeding began. The *Atkins* court also cited to a case involving question of when a cause of action accrues for negligent failure of an insurance company to settle a lawsuit. The court concluded that the cause does not accrue until the final judgment is reached, as the tort was not completed until that time, for no right had been invaded by the failure to accept the settlement offers. 417 S.W.2d at 153-54. Similarly, here, a preliminary report in no way invades any right of the plaintiffs as, at the point, Beeson and the Five Investors might have successfully challenged the findings in the preliminary report.

2.

We find no merit in the Firm's second argument. In response to the investigation by the FHLBB, Beeson attempted to rectify the situation by buying out two of the other investors. To accomplish this buyout, Beeson had to take out further loans from First South. Beeson argues that buying the other stock cannot be equated with damage to him, because if it had not been for the Firm's malpractice, the stock purchase may well have been advantageous to him. This may be true, but Beeson went further into debt and purchased stock in an attempt to rectify a problem allegedly caused by the Firm's malpractice. Although it was Beeson's choice to attempt to rectify the situation in this manner, he entered into the transaction because of the acting-in-concert problem. We believe that this constituted a legal injury. We therefore affirm as to Beeson.

3.

Beeson's buyout, however, did not cause further expense to the Five Investors. As a result, we must consider the third alleged legal injury. The Firm argues that plaintiffs were damaged when the FHLBB issued its final exam report in February 1986 and sent Beeson two proposed cease and desist orders on July 8, 1986.

We asked the parties to submit supplemental briefing on the effect of these proposed orders. Unfortunately, we cannot adequately determine, from the present state of the record, exactly what effect those orders had on the legal rights of the Five Investors. If the proposed orders affected the Five Investors, they might well have suffered legal injury. [p.618]

Because the proposed orders do not appear in the record, the district court is in a better position to resolve the issue as to whether legal injury occurred. We therefore vacate the summary judgment as to the Five Investors and remand for determination of whether a material issue of fact exists a as to whether they suffered any legal injury prior to the critical date. In making this determination, the district court should carefully consider the holding in Atkins. There, the cause of action did not accrue until the IRS issued a deficiency. The time at which the IRS began investigating Atkins apparently was irrelevant and is not mentioned in the opinion. Here, the Final Exam report may do nothing more than warn the plaintiffs that future coercive action is inevitable. But, inevitable injury does not constitute sufficient injury to begin the running of the statute of limitations under Atkins.

V.

The RTC argues that the district court erred in granting

summary judgment on its legal malpractice claim as time-barred because the principals at First South were aware of the possible acting-in-concert problems more than two years prior to the time the RTC filed its complaint. Again, the district court does not appear to have made a finding as to when First South suffered legal injury. In the district court, the RTC apparently argued that FIRREA revives an otherwise stale claim under 12 U.S.C. § 1821(d)(14). The district court rejected this argument, and we since have ruled that FIRREA does not receive stale claims. See *FDIC v. Belli*, 981 F.2d 838, 842-43 (5th Cir.1993).

According, the relevant statute of limitations is 28 U.S.C. § 2415, which denotes a three-year period for tort actions brought by the government.6 Under this statute, our inquiry is whether the cause of action accrued prior to April 24, 1986—three years before the suit was filed. Of course, this would be the critical date only if the claim was stale under the state statute of limitations when First South failed.

We previously have noted that neither section 1821(d)(14) revives claims barred under state law where the FDIC takes over after the claim has prescribed. See *Belli*, 981 F.2d at 842 (section 1821 (d)(14)); *FDIC v. Wheat*, 970 F.2d 124, 128 n. 7 (5th Cir.1992) (citing *United States v. Sellers*, 487 F.2d 1268, 1269 (5th Cir.1973)) (section 2415). The FSLIC took over First South on March 15, 1989. Because the FSLIC filed the relevant claims against the Firm one month later, the relevant question becomes whether the claims were barred under Texas law on March 15, 1989; if the cause of action accrued before March 15, 1987, it is barred by the state statute of limitations and may not be revived by federal law.

[15] Assuming that the claim is not barred under Texas law, it is timely under federal law, as the FSLIC filed it within the three-year federal limitations period, because a finding in favor of the RTC on the state law issue means that the claim must have accrued after April 24, 1986. Because the critical date under federal law is April 24, 1986, nearly one year earlier that the critical date under state law, the only relevant inquiry is whether the claim prescribed under Texas law.[7]

The RTC first argues that a cause of action does not 'accrue,' under the meaning of that term in section 2415, until the government entity acquires the claim in question. We rejected that reading in *Belli*, 981 F.2d at 840-42. Although in Belli [p.619] we interpreted section 2415(a), our rationale is equally applicable to the provision deals with contract actions, while the latter addresses tort actions. The relevant language is identical. As a result, we reject the RTC's first argument.

[16] The RTC next argues, as did Beeson and the Five Investors, that it do not sustain damages as a result of the breach of duty before the critical date. As we noted above, the cause of action does not accrue until the breach of duty causes legal injury. The RTC argues that it did not sustain any such injury until it was forced to look to the collateral for payment on the notes. The RTC asserts that the Firm produced no evidence in the summary judgment record to establish when First South sustained damages as a result of the alleged breach of duty.

Because the district court failed to make findings as to when First South suffered legal injury, we vacate the judgment as to the RTC's malpractice claim and remand for fur-

ther proceedings.[8] The district court is better situated to decide whether a material issue of fact exists as to when First South suffered a legal injury. The record is sufficiently opaque that we cannot determine with certainty that a material issue of fact does not exist on this issue.[9]

VI.

In summary, we AFFIRM the grant of summary judgment in favor of the RTC on the promissory notes as to Beeson and Foster and DISMISS the appeals of Johnson, Randolph, Ranzau, and Altman on this issue as moot. We AFFIRM the grant of summary judgment against Beeson on his malpractice claim and VACATE the summary judgment against Foster, Johnson, Randolph, Ranzau, and Altman on their malpractice claims and REMAND for further proceedings. We VACATE the summary judgment against the RTC on its legal malpractice claim and REMAND for further proceedings. [p.620]

Footnotes

1. Lincoln was taken over by the Federal Savings and Loan Insurance Corporation ("FSLIC") in 1989 and later placed under conservatorship of the Resolution Trust Corporation ("RTC"). Its stock is worthless.

2. Beeson also raises an issue as to the failure of the delivery as to one note. Because Beeson accepted the loan proceeds, any defect was cured. See Texas *Reserve Life Ins. v. Security Title Co.*, 352 S.W.2d 347 (Tex.Civ.App.–San Antonio 1961, writ ref'd n.r.e.) (express ratification of a defective delivery renders it a good delivery)

3. We reject the Firm's argument that the Five Investors did not plead that the Firm never told them the Firm was not representing them. The Five Investors pled that the Firm represented them; that allegation met requirements of Fed R.Civ.P.8. After properly pleading this allegation, the Five Investors were free to offer any evidence supporting it. The district court erred by holding that the Five Investors had to plead this fact as such s standard would be plainly inconsistent

with rule 8.

4. Texas courts have also held that the traditional discovery rule applies in legal malpractice cases. *Willis v. Maverick*, 760 S.W.2d 642, 646 (Tex.1988)

5. The Firm argues that Beeson and the Five Investors are seeking to employ the discovery rule without pleading it. The parties disagree over who has the burden of pleading the discovery rule and whether the rule applies in this case. Although the discovery rule must be pled in state court, see *Woods V. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex.1988), the same is not true in federal court, see *Wellborn v. Sears, Roebuck & Co.*, F.2d 1420, 1425 (5th Cir.1992).

Although the discovery rule still can be urged, it does not appear to apply in this case. Beeson's main argument is that he did not suffer legal injury until after the critical date. The discovery rule prevents a cause of action from accruing after the tortious act has been committed, and legal injury suffered, when the plaintiff has not discovered either the act or the injury. Here, Beeson knew about the alleged tortious act and about the events that the Firm alleges constitute legal injury. He can prevail only if he proves that these events do not constitute a legal injury, thereby making the discovery rule irrelevant.

6. The RTC's attempt to re characterize a legal malpractice action as a contract action rather than a tort action is unpersuasive. Under Texas law, a legal malpractice action sounds in tort. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex.1988). Although we are interpreting a federal statute of limitations, we think it proper to rely upon state characterizations of the state causes of action for limitations purposes.

7. In other words, legal malpractice claims brought by the RTC on behalf of a financial institution involve two different critical dates for limitations purposes. First, the government must take over the institution before the cause of action has gone stale under state law, in this case meaning that the time between accrual of the cause action and the government takeover of the institution must be less than two years. Second, even if the government takes over the failed institution before the claim has gone stale under state law, the government must file the action within three years of the accrual of the claim. A court ordinarily will have decide only one of the two issues, because the answer to one will dictate the result of the second.

8. The RTC's second amended complaint alleges that the Firm's malpractice caused the FHLBB to attack the borrowers' change of control application, which caused the borrowers' stock in Lincoln to become worthless, which, in turn, left First South's loans to the borrowers inadequately secured. Assuming these well pleaded facts are true, it is not evident why the FHLBB's February 1986 final examination report and proposed cease and desist orders did not cause an immediate reduction in the value of the borrowers' stock in Lincoln. It is even less

plain why the reduction in the value of the stock did not reduce the value of the promissory notes secured by the stock, and, therefore, constitute injury to First South. Nevertheless, the parties did not flesh out these arguments well in their briefs, and we leave them to the district court for its determination.

9. Charles Phillips was the Chairman of First South and a partner of the Firm. The RTC argues that Phillip's knowledge should not be imputed to First South for the purpose of applying the discovery rule. Although this assertion has merit, the summary judgment record contains ample evidence to indicate that the other officers of First South knew of the acting-in-concert problems and the Firm's involvement with the Lincoln transaction well before the critical date. As a result, we agree with the district court that First South had notice of the alleged breach of duty prior to the critical date. The RTC also raises the "adverse domination theory" on appeal. Because the RTC did not raise this argument in the district court, however, we elect not to address it for the first time on appeal. See *Boddie v. City of Columbus*, 989 F.2d 745, 752 (5th Cir.1993).

APPENDIX "B"

OPINION BELOW OF THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT L. RANDOLPH, et al.,	§	
	§	
Plaintiffs	§	
	§	
vs.	§	CIVIL ACTION NO. H-89-1302
	§	
FIRST SOUTH SAVINGS	§	
ASSOCIATION and RESOLUTION	§	
TRUST CORPORATION, as	§	
Conservator for the First	§	
South Federal Savings	§	
Association, by the Federal	§	
Deposit Insurance Corporation	§	
as Manager for the Conservator,	§	
et al.,	§	
Defendants	§	

ORDER

Pending before the Court are the following motions: a motion for summary judgment by the Resolution Trust Corporation ("RTC") as receiver of First South Savings Association ("First South"), a motion for summary judgment by the Law Firm Defendants, and a motion for summary judgment by the Third-Party Defendants. For the reasons below, the Court finds all three motions should be granted.

I. RTC's motion for summary judgment

This lawsuit involves a series of promissory notes executed by Robert Randolph, John Beeson, Richard White, Bob Johnson, Lynn Foster, M.D. Altman, and Dennis Ranzau ("the borrowers") in favor of First South. The borrowers used the proceeds from the loans to purchase a major-

ity of the stock in [p.1] Lincoln Savings and Loan Association ("Lincoln"). In August 1985, following the borrowers' purchase of the Lincoln stock, the Federal Home Loan Bank Board ("bank board") began an investigation of the stock purchase, expressing concerns over possible acting in concert problems. In 1987, after issuing a cease and desist order, the board required Beeson and those borrowers who were members of Lincoln's Board of Directors to resign and to relinquish their Lincoln stock.

On January 31, 1989, First South filed a lawsuit against the borrowers in the District Court of Harris County to recover the amounts owed on the promissory notes. The borrowers filed a subsequent lawsuit seeking cancellation of their notes and damages against First South and the lawyers who represented them in the stock purchase.

On March 16, 1989, the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as conservator of First South. The FSLIC removed the lawsuit to federal court. Later, the RTC succeeded to the rights and powers of the FSLIC as conservator of First South. On July 12, 1991, First South was placed in receivership, and the RTC was appointed receiver. The RTC has filed a motion for summary judgment to recover the amount owed on the notes.

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The United [p.2] States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In support of its motion for summary judgment, the RTC

attaches copies of the seven promissory notes executed in favor of First South. The RTC also provides the affidavit of Dana Curtis, site manager for the Resolution Asset Contractor of First South, who testifies that each of the seven borrowers defaulted on payment of his note and that each of the seven failed to make payment following demand. Ms. Curtis testifies that the RTC is the owner and holder of the seven promissory notes executed by the borrowers in favor of First South.

There is also evidence that the note executed by Beeson was secured by Beeson's interest in two parcels of real estate in Houston. In support of its motion for summary judgment, the RTC attaches a copy of the deed of trust covering the two parcels of land. The evidence shows that after providing proper notice, the RTC sold the property securing Beeson's note at a foreclosure sale. First South purchased both properties for a total of $900,000.00. The RTC credited this amount to the principal amount owed on Beeson's note.

In Texas, the maker of a promissory note promises to make payment in accordance with the note's terms. Tex. Bus. & Comm. [p.3] Code Ann. § 3.413. The RTC, as holder of the notes, is thus entitled to judgment for the unpaid amounts if there are no valid defenses against enforcement of the notes.

In response to the RTC's motion for summary judgment, the borrowers allege that First South had "actual or imputed knowledge of the change of control problems regarding the purchase of Lincoln stock." The borrowers seek damages against First South for failing to advise the borrowers of the problems concerning the purchase of Lincoln stock and for agreeing to execute the loans in view of these problems. The borrowers' affirmative claims include negligence, common law fraud, and fraud in the inducement.

In addition, Beeson seeks cancellation of his note because of First South's alleged wrongful foreclosure of the collateral property. Beeson contends that First South required

him to show that Beeson's title to the collateral property was free and clear of encumbrances before the savings and loan would loan him funds. Beeson alleges that Title USA Company informed Beeson that he would have to pay $57,000.00 in fees and taxes to obtain a clear title to the land. Beeson contends that despite his failure to pay the required amount, the loan documents, "somehow, without the knowledge or consent of Beeson, came into the possession of First South." Beeson alleges the foreclosure sale was invalid because of First South's handling of the loan documents.

The Court finds that the borrowers' defenses and affirmative claims against the RTC are barred by the doctrine established in *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). [p.4] The *D'Oench. Duhme* doctrine precludes the use of unrecorded side agreements between the bank and the borrower as the basis of either claims or defenses against the FDIC. The Fifth Circuit Court of Appeals has held that the doctrine protects the FDIC from the effect of unrecorded agreements even if the FDIC as receiver had knowledge of the contents of the agreement. *Kilpatrick v. Riddle*, 907 F.2d 2121 (5th Cir. 1990).

The doctrine has been codified at 12 U.S.C. § 1823(e), which provides that no agreement which tends to diminish or defeat the FDIC's right, title, or interest in an asset is valid unless the agreement:

1. Is written;
2. Was executed by the bank and the parties claiming an adverse interest under the agreement contemporaneously with the acquisition of the asset by the FDIC;
3. Was approved by the bank's board of directors or loan committee, and the approval is noted in the minutes of either;

4. Was continuously, from the time of its execution, an official record of the bank.

12 U.S.C. § 1983(e). The statute also provides that the *D'Oench Duhme* doctrine and § 1823(e) apply to both the RTC and the FDIC in their receivership capacities. Because FIRREA prevents the borrowers from recovering on their affirmative claims against the RTC and precludes the borrowers from asserting their defenses, the RTC is entitled to recover the amounts owed on the notes. [p.5]

II. Defendants' Motion for Summary Judgment

In addition to suing First South, the borrowers also seek damages against the "law firm Defendants." The borrowers allege that Defendants gave negligent advice concerning the purchase of Lincoln stock and were negligent in drafting the loan documents relating to the takeover. The basis of the borrowers' complaint is a letter written by Defendant Charles Harrell on December 31, 1984 to the bank board. The borrowers allege that Harrell represented in the letter that the borrowers were acting in concert.

The borrowers claim that Defendants' negligence resulted in the board's finding that the borrowers were acting in concert. The RTC has also asserted a claim seeking contribution and indemnity in the event Plaintiffs recover on their legal malpractice allegations. In addition, the RTC amended its cross action against the law firm Defendants to add a third-party complaint against the individual members of the law firms ("third party Defendants"). In its amended cross-action, the RTC also asserts an independent legal malpractice allegation against these defendants. Both the law firm Defendants and the third-party Defendants have filed motions for summary judgment. The Court will address both motions.

The Court is aware of Defendants' argument that the proper law firm Defendant has never been sued. Because the

name of the law firm which Beeson retained to provide legal representation changed several times during the relevant time period, the Court is inclined to agree with Defendants. However, in order to facilitate [p.6] a resolution of this lawsuit, the Court will address the parties' arguments and motions as if the proper entity had been served.

At the outset, the Court is of the opinion that all the borrowers' claims, except those allegations asserted by John Beeson, lack merit in view of the absence of privity between the parties. In Texas, an attorney owes no duty to a third party in the absence of privity of contract. *First Municipal Leasing Corp. v. Blankenship. Potts. Aikman Haqin & Stewart*, 648 S.W.2d 410, 413 (Tex. App.—Dallas 1983, writ ref'd n.r.e.). In addition, persons outside the attorney-client relationship have no cause of action for injuries they might sustain as a result of an attorney's failure to perform a duty owed to a client. *Dickey v. Jansen*, 731 S.W.2d 581 (Tex.App.—Houston [lst Dist.] 1987, writ ref'd n.r.e.).

The evidence shows that Beeson retained the law firm Defendants to provide legal representation concerning the takeover of Lincoln. Defendants attach copies of interrogatory answers in which the other borrowers testify as follows concerning their relationship with the law firm:

> I have never directly consulted with the defendant-attorney . . . rather the defendant attorney was retained by John S. Beeson, one of the Plaintiffs herein. . . .

In addition, in response to inquiries involving the legal malpractice allegations, the borrowers testify as follows: "I have no direct personal knowledge of these inquiries but would refer you to Plaintiff John S. Beeson who dealt directly with the defendant attorney." [p.7]

In response to Defendants' arguments concerning lack of privity, Plaintiffs make the following arguments: (1) the law

firm Defendants' fees were paid from proceeds of the loans obtained from First South; (2) the borrowers had no other legal representation in connection with the takeover of Lincoln; (3) the law firm Defendants were aware that the borrowers relied on the lawyers' representation; and (4) the borrowers authorized Beeson to retain the law firm Defendants on their behalf. As evidence in support of their arguments, the borrowers provide the affidavit of Beeson who testifies that he retained the lawyers to represent all the borrowers and that legal fees were paid from First South loan proceeds.

The Court finds that the borrowers have failed to provide legal authority to support their arguments. Citing *Kotzer v. Kelly*, 791 S.W.2d 254 (Tex.App.—Corpus Christi 1990, no writ), the borrowers argue that an attorney may be held liable for negligence when he fails to advise a party that he is not representing him when circumstances would lead the party to believe that the attorney is providing representation. However, the borrowers' pleadings do not contain such an allegation. In the absence of authority for their argument that the borrowers should obtain the benefits of the attorney-client relationship between Beeson and the law firm, the Court finds that only Beeson is entitled to assert legal malpractice allegations against Defendants.

In support of their motion for summary judgment, Defendants also argue that Beeson's legal malpractice claims are [p.8] barred by the applicable statute of limitations. The Court agrees. In Texas, tort actions for legal malpractice must be brought within two years after the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.003. *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). The cause of action is said to accrue when a plaintiff, through the exercise of ordinary diligence, knew or should have known the facts establishing the elements of his cause of action. *Id.* at 646. The Court is of the opinion that Beeson's causes of action accrued at least four years prior to the commencement of

suit.

Beeson first asserted his claims against Defendants by filing his state court petition on February 8, 1989. The evidence shows that in August 1985 the bank board began to investigate the purchase of Lincoln stock. In Plaintiff's original petition, Beeson alleges that he learned at that time that the bank board was inquiring into the possibility that there was an acting in concert problem concerning the purchase of Lincoln stock by certain borrowers. On October 25, 1985, Beeson received a copy of the bank board's preliminary report, which contained allegations that the borrowers were acting in concert.

The evidence shows that on November 5, 1985, Beeson sent a letter to the bank board in which he outlined his proposals for eliminating any appearance of conflict existing at Lincoln. In their motion for summary judgment, Defendants argue that as early as November 1985 Beeson was well aware of the possible acting in concert problems. [p.9]

In response to Defendants' statute of limitations argument, the borrowers argue that a fact question exists concerning when Beeson and the other borrowers became aware of the facts concerning their allegations. As evidence in support of their argument, the borrowers provide the affidavit of Beeson who testifies as follows:

> At no time did either Harrell or Levi tell me the FHLBB would find anything objectionable with anything set forth in Harrell's letter. Presumably if Harrell or Levi thought that there was anything in the matters set out in the Harrell letter that the FHLBB would find objectionable they would have told me and the other purchasers.

Because Plaintiff's evidence fails to raise a fact question concerning whether Beeson knew of the possible acting in

concert problems before November 1985, the Court finds that Beeson's allegations against Defendants are barred by the applicable statute of limitations.

The Court finds that the RTC's legal malpractice allegations against the law firm Defendants are also barred by the two-year statute of limitations. The FSLIC as conservator of First South filed a cross action against Defendants seeking contribution and indemnity on April 24, 1989. After becoming conservator of First South, the RTC amended its complaint, adding an independent legal malpractice allegation. In its first amended cross-action, the RTC alleges that Defendants should have notified the board o First South of the risks of allowing the borrowers to use the Lincoln stock as security for their loans. [p.10]

The evidence before the Court shows that the principals of First South were aware of the possible acting in concert problems at least two years prior to the time the RTC filed its complaint against Defendants. At his deposition, Beeson testified that in August 1985 after receiving the preliminary report of the bank board's investigation of Lincoln he orally notified First South and Charles Phillips, First South's chairman, of the board's findings. There is also evidence that William King, one of the law firm Defendants, consulted with Phillips throughout the Lincoln takeover concerning the possible acting in concert problems. The Court therefore finds that prior to the end of 1985 First South knew or should have known of any claim it might have had against Defendants.

In the event the Court finds the borrowers and First South's claims against Defendants are time-barred, the RTC argues that FIRREA revives these allegations. In *FDIC v. Shrader & York. et al*, CA No.H-91-1372 (S.D.Tex. 1991), this Court held that FIRREA does not revive claims which are already barred at the date of conservatorship. In the absence of a ruling from the Fifth Circuit Court of Appeals that the Court erred in its reading of the statute, the Court is

not inclined to change its prior holding. Thus, the Court finds that First South's claims are barred by the applicable statute of limitations and FIRREA does not revive the causes of action.

For the reasons above, it is therefore [p.11]

ORDERED that the RTC's motion for summary judgment for recovery on the notes (entry #71) is GRANTED. It is further

ORDERED that the law firm Defendants' motion for summary judgment (entry #72) is GRANTED. It is further

ORDERED that the third-party Defendants' motion for summary judgment (entry #74) is GRANTED.

All other motions are denied as moot.

Signed this 27th day of April, 1992 at Houston, Texas.

NORMAN W. BLACK

UNITED STATES DISTRICT JUDGE [p.12]

APPENDIX "C"

DENIAL OF MOTION FOR REHEARING

BY THE COURT OF APPEALS

FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2394

ROBERT L. RANDOLPH, ET AL.,

Plaintiffs and Counter
Defendants-Appellants,

versus

RESOLUTION TRUST CORPORATION,
As Receiver for FIRST SOUTH
SAVINGS ASSOCIATION,

Defendant-Counter Plaintiff
and Cross Plaintiff-Third
Party Plaintiff
Appellant/Appellee,

versus

PHILLIPS, KING & SMITH, Attorneys at Law, Et Al.,

Defendants-Cross
Defendants-Appellees,

versus

E. ASHLEY SMITH, P.C., Et Al.,

Third-Party Defendants
Appellees.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING
(SEPTEMBER 15, 1993)

Before WISDOM, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-4

Supreme Court, U.S.
FILED
FEB 17 1994
OFFICE OF THE CLERK

(2)

No. 93-955

IN THE

Supreme Court of the United States

October Term, 1993

JOHN S. BEESON, ET AL.,
Petitioners,

v.

PHILLIPS, KING AND SMITH, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals erred in affirming the summary judgment, finding Petitioner's state law claim against the Law Firm was time-barred, for the judicially admitted and legally dispositive reason Petitioner's buy-out of several co-investors in Lincoln savings and loan, in an attempt to remedy acting in concert charges, established the accrual of his legal injury under Texas law?

LIST OF PARTIES

1. John S. Beeson, Petitioner;
2. Lynn Foster
3. Phillips, King & Smith, Respondent
4. Phillips, King, Smith & Wright, Inc.
5. Phillips, King, Smith & Wright, P.C.
6. Smith, Wright & Weed, P.C.
7. Charles E. Harrell, Respondent
8. Anthony W. Nims, Respondent
9. Harold L. Levi, Respondent
10. E. Ashley Smith; E. Ashley Smith, P.C., Respondent
11. C. Lee Crawley, Respondent
12. C.L. Crawley, Jr., P.C., Respondent
13. William E. King, Respondent
14. G. Christopher Scruggs, Respondent
15. Robert L. Johnson, III, Respondent
16. Thomas H. Weed, Respondent
17. W. David Blunk, Jr., Respondent
18. First South Savings Association - In Receivership
19. Resolution Trust Corporation, Respondent

Other parties to the Court of Appeals Decision who have no interest in the outcome of this Petition.

1. Robert L. Randolph
2. Bob M. Johnson
3. Mickey D. Altman
4. Dennis R. Ranzau

Pursuant to Rule 29.1, there are no private parent companies or subsidiaries.

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No. 93-955

IN THE

Supreme Court of the United States

October Term, 1993

JOHN S. BEESON, ET AL.,
Petitioners,

v.

PHILLIPS, KING AND SMITH, ET AL.,
Respondents.

AND

RESOLUTION TRUST CORPORATION, RESPONDENT

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Lynn Foster joins John Beeson ("Petitioner") only on the portion of the Court of Appeals' decision involving Respondent RTC. Petitioner Beeson petitions for a writ of certiorari regarding the portion of the Court of Appeals' decision involving Respondents, Phillips, King and Smith, et. al., the "Law Firm." He challenges the Court of Appeals' legal determination that his negligence claim against the Law Firm was time-barred under Texas law.

1. FACTUAL HISTORY. In early 1984, Petitioner, Jerry Holley and Marvin Haas decided to purchase the controlling stock of the Florida institution known as Lincoln Savings & Loan ("Lincoln"). Petitioner contacted the Law Firm, to prepare and file a change of control application with the Federal Home Loan Bank Board ("FHLBB"). After the Law Firm prepared and filed the change of control application, the FHLBB rejected it due to Haas' and Holley's backgrounds. However, the FHLBB allowed Petitioner to go forward with the Lincoln purchase on the condition he sign a supervisory agreement which assured he would be the primary shareholder and that he would not transfer stock ownership to insiders or others who would act in concert to control Lincoln.

After Petitioner signed the supervisory agreement, he located Robert L. Randolph, Bob M. Johnson, Lynn Foster, M. D. Altman, Dennis R. Ranzau and several other individuals ("the Borrowers") to invest in the venture and they arranged to borrow money from First South Savings Association ("First South") to purchase the Lincoln stock. In December 1984, Petitioner informed the Law Firm about the co-investors and the Law Firm prepared and filed a letter with the FHLBB, providing the names of the Lincoln co-investors.

On January 5, 1985, Petitioner and the Borrowers closed the loan and pledged their Lincoln stock to First South as partial collateral. Thereafter, Petitioner and the Borrowers took control of Lincoln, appointed themselves directors and officers and made loans to each other. In the fall of 1985, the FHLBB examined Lincoln.

The examination resulted in the FHLBB questioning Petitioner's arrangements for Lincoln's purchase, citing regulatory violations committed by Lincoln's management

(Petitioner and the Borrowers), probing the existence of Lincoln's financial soundness, and commencing the removal of Petitioner and the Borrowers from Lincoln ownership for, among other things, acting in concert.[1] Ultimately, Lincoln was deemed insolvent, placed in receivership, and its stock allegedly became worthless.

2. PROCEDURAL HISTORY. In January 1989, First South filed a state lawsuit against Petitioner and the Borrowers to collect on the note. The next month, Petitioner and the Borrowers filed their own lawsuit, seeking to cancel the First South notes and alleging the Law Firm's negligence. As to the Law Firm, it was alleged:

> *Due to the Defendants' negligent actions ... in regards to the handling of the change of control of Lincoln ... Plaintiff Beeson was required to purchase the Rizk, et al stock* thus preventing Plaintiffs from raising additional capital to infuse into Lincoln ... due to the owners of Lincoln not being able to furnish

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[1] In 1985, the FHLBB found Petitioner and the Borrowers owned more stock than represented and concluded the higher ownership was due to Petitioner's purchase of 66,666 additional shares, which violated the parties' stock restriction agreement. Subtracting these shares from the Borrowers' percentage stock interests FHLBB agents discovered the Borrowers' percentages exceeded five percent. FHLBB determined Petitioner violated his Supervisory Agreement, mandating FHLBB permission before the Borrowers could invest in Lincoln, and the Borrowers needed to file their own change of control applications. 12 U.S.C. §1730(e)(1). Further, each Borrower was indebted under the First South loan for his 5% ownership interest and for *other* Borrower's loan obligations to the extent of such 5% ownership. Thus, each Borrower owned ten or more percent of Lincoln's stock and was "acting in concert."

> their knowledge and experience and the lack of the right to infuse additional capital, Lincoln was unable to make sound decisions causing Lincoln's stock to eventually become worthless all to Plaintiff's damages ... (emphasis added).

In March 1989, FSLIC became First South's conservator. FSLIC assigned the management of First South to FDIC, which removed both Beeson's and First South's state court cases to federal court in April 1989, and consolidated the actions into Beeson's Civil Action No. 89-1302. Thereafter, on July 12, 1991, RTC took over as receiver and cross-claimed against the Law Firm.

After sufficient time for discovery, the Law Firm moved for a summary judgment. On April 27, 1992, the federal district court signed a summary judgment order which provided that both RTC's and Petitioner's claims against the Law Firm were barred by the statute of limitations.

Petitioner appealed to the United States Fifth Circuit Court of Appeals. On appeal, the Fifth Circuit, on the basis the Texas Supreme Court's 1967 decision in *Atkins v. Crosland*, 417 S.W.2d 150 (Tex. 1967), affirmed the portion of the summary judgment regarding Petitioner's claim against the Law Firm, holding the claim accrued in 1986, when Petitioner incurred expenses in an attempt to remedy FHLBB charges of acting in concert violations, by buying-out various Lincoln shareholders.

A. SUMMARY OF OPPOSITION

This case is not worthy of certiorari. The two-year Texas statute of limitations for legal malpractice claims mandates that an legal injury accrues when an tortious act

causes a risk of harm or damage, no matter how slight. The Court of Appeals properly reviewed Petitioner's pleading, his deposition testimony and the undisputed factual circumstances of the case in determining Petitioner's cause of action was barred by the Texas statute of limitations. In his petition, Petitioner identified his injury, an alleged defectively prepared change of control application, and the first legally significant sign of damage from such injury, his buy-out of several co-investors listed on his change of control application in the attempt to remedy FHLBB acting in concert charges. This was the legal consequence of such facts under the Texas legal injury rule. The Court of Appeals' opinion also confirms the district court's observation that Petitioner was *aware* of the "acting in concert" charge raised by the FHLBB in 1985. But the Court of Appeals determined Petitioner's legal injury accrued a year later, in 1986, thereby giving him more benefit of the doubt than he may have received by a Texas court. Under either scenario, his lawsuit filed in 1989 was barred by the Texas Statute of Limitations.

B. THE DISTRICT COURT'S OPINION

The district court found that Petitioner's cause of action against the Law Firm accrued at least four years prior to the filing of his lawsuit on February 8, 1989. Judge Black observed the undisputed evidence that, in August, 1985, the FHLBB began to investigate Petitioner's purchase of Lincoln and that, by October 25, 1985, Petitioner reviewed a copy of the FHLBB's report which charged him with the commission of various ethical and regulatory violations, including having acted in concert with others to control Lincoln Savings. For instance, in his deposition testimony, Petitioner stated he had:

> physical meetings with these people at their offices at First South and said, 'Hey, these

> people are accusing me of violating a change of control and acting in concert statutes, and this stuff has real serious criminal penalties, and I don't like it at all

Although it was not pled, the district court applied the discovery rule, a mechanism intended to toll the usual running of limitations, to Petitioner's claim. The district court's decision comports with Texas Supreme Court law that, when a person has knowledge of the facts which constitutes his claim, the Texas statute of limitations begins to run. *Sutherland v. Caballero,* 759 S.W.2d 945 (Tex. 1988) (legal injury rule doesn't apply when client previously aware of facts for which he later sues).

C. Fifth Circuit's Opinion

The Fifth Circuit affirmed the summary judgment, but under a different limitations time frame. *Texas Refrigeration Supply, Inc. v. Federal Deposit Ins. Corp.*, 953 F.2d 975, 980 (5th Cir. 1992); *Petroscience Corp. v. Diamond Geophysical, Inc.*, 684 S.W.2d 668, 669 (Tex. 1984) (summary judgment is proper if any ground asserted is valid even though upheld on wrong theory). *See also Sutherland v. Caballero,* 759 S.W.2d at 946 (affirming on different limitations time frame). The Fifth Circuit observed the undisputed fact that, by October 1985, Petitioner Beeson knew the facts constituting his claim. However, applying the 1967 Texas Supreme Court *Atkins* case, the Court determined Petitioner's legal injury accrued when he sustained the monetary loss incurred by his co-investor buy-out. Although the Court of Appeals failed to observe that, twenty-one years after *Atkins*, Texas adopted the discovery rule in legal malpractice cases, in *Willis v. Maverick*, 760 S.W.2d 642, 646 (Tex. 1988), and that, in this instance, the discovery rule triggered the accrual of Petitioner's claim in October 1985,

the Court of Appeals' decision, nonetheless, yielded the same outcome: Petitioner's claim i s time-barred.

REASONS FOR DENYING THE WRIT

A. THIS CASE DOES NOT PRESENT AN ISSUE WORTHY OF CERTIORARI.

1. THIS CASE PRESENTS A LEGAL DETERMINATION ON A FACT SPECIFIC ISSUE.

The accrual of a cause of action is a legal determination made by Texas courts under a variety of different factual settings. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). The general rule in Texas is that a cause of action accrues when facts come into existence which give a claimant a right to sue. *Robinson v. Weaver,* 550 S.W.2d 18 (Tex. 1977). In tort actions, which carry a two year limitations period, it is when "the wrongful act effects an injury regardless of when the claimant learned of such injury." *Id.* at 19. However, there are two exceptions to the rule of accrual: the discovery rule, *Gaddis v. Smith,* 417 S.W.2d 577, 578-79 (Tex. 1967), and the legal injury rule. *Tennessee Gas Transmission Co v. Fromme,* 269 S.W.2d 336, 337 (Tex. 1954) (as cited in *Clade v. Larsen,* 838 S.W.2d 277 (Tex. Ct. App. 1992)).

At issue is the legal injury rule. This rule applies when a party engages in lawful activities that allegedly injure another and, thus, a cause of action is said not to accrue until the claimant sustains some legally actionable harm. *Tennessee Gas,* 269 S.W.2d at 337; *Atkins v. Crosland,* 417 S.W.2d 150,153 (Tex. 1967). The "harm" under which a legal injury accrues is defined as when a plaintiff's legal position to the issue becomes fixed, *regardless of whether damages have yet occurred or have been fully established.*

Atkins, 417 S.W.2d at 153; *Smith v. Knight*, 608 S.W.2d 165 (Tex. 1980). The Court of Appeals articulated the Texas legal injury rule as: (1) the commission of a tortious act, and (2) the suffering of a legal injury. While this definition is not precisely Texas law, the outcome remains the same — Petitioner's claim is time-barred.[2]

2. PETITIONER FAILS TO INVOKE RULE 10 AND SEEKS ONLY TO ARBITRATE A PRIVATE DISPUTE.

Petitioner's challenge has absolutely nothing to do with federal law; he disputes only the result of a state-based negligence claim against other Texas citizens. His dispute with the Court of Appeals' determination, regarding the accrual of his cause of action under Texas law, fails to warrant this Court's discretion or consideration. Although

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[2] *Atkins* was actually a case of first impression involving a federal agency's actions under federal limitations on a two-party lawsuit governed by state limitations. In *Atkins*, four dates could have commenced accrual of a taxpayer's claim: (1) the time of the accountant's negligent conduct; (2) the time the tax was due; (3) the time of the assessment; or (4) the time the assessment was paid. W. Honey, *Limitation Of Actions*, 46 TEX. L. REV. 119, 124 (1967). Had the action accrued at the time of performance or when due, plaintiffs would be forced to sue within *two years* under state law, while IRS has *three years* to assess a deficiency under federal law. Under this scenario, the extent of tax liability is impossible to prove. Because deficiency assessments generally *must* be made within three years of the filing of a tax return, the *Atkins* court held a legal injury accrued upon the deficiency notice. *Limitations of Actions, supra* at 124. *But in reaching its decision, the court expressly stated the statutory policy of preventing stale claims was not violated. Id. (citing Atkins,* 417 S.W.2d at 154). *Atkins* has been redefined as a discovery rule case. *Hoover v. Gregory*, 835 S.W.2d 668, 673 (Tex. Ct. App. 1992).

he cites 28 U.S.C. § 1254(1) as a jurisdictional basis for review, his challenge underscores the reasons for Supreme Court Rule 10.

Rule 10 is the procedural rule promulgated by this court to indicate the character of reasons considered in the grant or denial of a petition for certiorari. J. MOORE, 13 MOORE'S FEDERAL PRACTICE ¶ 810.07 (2d ed. Supp. 1994fr). That rule states:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual court of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the court's power of supervision.

Petitioner's claim involves none of these considerations. Absent is any challenge regarding a conflict among the circuits, a determination of a federal question contrary to a state court of last resort, an *Erie v. Tompkins*

issue[3] or a matter of public importance. Instead, he challenges only the Court of Appeals' perceived failure to adopt his view of Texas law. Although he casts his petition to this Court as involving an evidentiary burden issue, in reality, he seeks the application of his subjective view of Texas' limitations law. On page 15 of his brief, he suggests that his buy-out of various other Lincoln shareholders might not have been a legal injury if it had corrected the FHLBB acting in concert charges. If that were the case, this lawsuit also would not have arisen. But his attempts to correct the harm were not successful, this lawsuit arose and his suggestion must fail because he, himself, admitted he purchased the other shareholder's stock to remedy the acting in concert violation allegedly caused by a deficiently prepared change of control application.

Further, his suggestion does not comport with *Atkins v. Crosland,* which holds:

> If the act is of itself not unlawful ... and plaintiff sues to recover damages subsequently accruing from, and consequent on, the act, the cause of action accrues, and *the statute begins to run, when, and only when, the damages are sustained*; and this is true although at the time

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[3] Prior to 1980, Supreme Court Rule 19, now Rule 10, recognized as a reason for granting certiorari the case when a court of appeals "decided an important state or territorial question in a way in conflict with applicable state or territorial law . . . ." *See* Rule 19(b) of the 1970 Rules and Rule 38(5) of the 1939 Rules (as cited in J. Moore, *supra* at ¶ 810.01 *et. seq.*). As noted by Professor Moore, the elimination of this ground in 1980 does not mean such reason is precluded from review but, instead, probably signals that the former provisions had served their time.

> the act is done it is apparent the injury will inevitably result. (emphasis added).

Id. at 153. As found by the Court of Appeals, Beeson admitted that, in 1986, he sought to correct the FHLBB's acting in concert charges lodged against him by purchasing the stock of various co-investors listed on his change of control application filed with the FHLBB. This was legally significant evidence Petitioner sustained damage resulting from the Law Firm's alleged negligent work on his 1984 change of control application.

Moreover, as mentioned before, and although not applied by the Court of Appeals, Petitioner's knowledge of the alleged negligently prepared change of control application, both at the time of the FHLBB's acting in concert charges in 1985 and by the time of his buy-out of others acting in concert in 1986, under Texas jurisprudence, bars him from disclaiming the accrual of his legal injury. *Sutherland,* 759 S.W.2d at 946 (legal injury rule does not apply when client is previously aware of the facts for which he later sues); *Arabian Shield Development Co. v. Hunt*, 808 S.W.2d 577, 583 (Tex. Ct. App. 1991) (accrual of the cause of action "does not await the plaintiff's recognition that he has grounds for a lawsuit"); *Clade v. Larsen,* 838 S.W.2d 277 (Tex. Ct. App. 1992) (remedial actions do not toll limitations and client cannot rely on later problems resulting from original act to "push back" the accrual date of the limitations statutes) (*Citing Tennessee Gas Transmission Co. v. Fromme,* 269 S.W.2d 336, 337 (Tex. 1954)) (limitations runs from time of wrongful act and bars suits for damages resulting therefrom though damages not fully developed during limitations period).

Finally, the mere failure of the Court of Appeals to apply either a precisely application, or Petitioner's

interpretation, of Texas limitations law is not, under Rule 10, a departure from the accepted or usual course of proceedings. It is well-established this exercise of the Supreme Court's power "refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the federal judicial process." Frankfurter, *supra* at 274. *See, also, Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (reversing district court's remand order where sole reason given by district court for remand was overburdened docket); *Hickman v. Taylor*, 329 U.S. 495 (1947) (defining scope of evidentiary protection to be given attorney work product in discovery process); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (correcting lower courts' holdings on constitutional questions before reaching statutory issues).

3. The Fifth Circuit Is In The Best Position To Determine Texas Law.

That Petitioner disagrees with the Fifth Circuit's decision is of no consequence. This Court has said many times "the courts of appeals, vis-à-vis the Supreme Court, should be the final arbiters of state law." *Id.* at ¶ 810.24-1[3] *(Citing Huddleston v. Dwyer*, 322 U.S. 232 (1944)). This court is not in the business of interpreting state jurisprudence. As stated succinctly by Justice Frankfurter:

> This is not to say that the correct decision of such cases is not important; it is only to say that the importance is of a different quality. The Supreme Court cannot undertake to see that every case in a federal court is decided as a state court would have decided it.

Frankfurter and Hart, supra, at 269-270 (discussing former Rule 38(5)(b)). Moreover, it has been observed that, if "a conflict between the decision of the Court of Appeals and 'applicable state or territorial law' would support a petition for a writ of certiorari, how did one determine what the law was?" J. Moore, *supra* at ¶ 810.25-1[3]. This observation applies forcefully to this petition. Petitioner fails to illuminate how the Court of Appeals differs from Texas law and why his petition for writ of certiorari is a matter of public importance. In light of the rule that the learned judges of the circuit courts are accorded much deference in applying the laws of their circuit, it is clear Petitioner desires a second hearing. The jurisdiction of certiorari was not conferred upon this Court "merely to give the defeated party ... another hearing." Taft, C.J. in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

4. PETITIONER'S "METAPHYSICAL" SUGGESTIONS DO NOT CHANGE THE LEGAL CONSEQUENCE OF HIS LEGAL INJURY.

By now it is clear Petitioner cannot "cast" this petition as an issue over "no summary judgment evidence" on which he had no burden. In federal practice, as contrasted with state practice, a non-movant may not "lay behind the log" of legal insufficiency. D. HITTNER, FEDERAL CIVIL PROCEDURE BEFORE TRIAL 5TH CIRCUIT EDITION, 14.142-45 (Rutter Group 1991). While state limitations is a matter of substantive law, the manner in which it is established is one of procedure for which federal law applies. *Resolution Trust Corp. v. Boyar, Norton & Blair*, 796 F.Supp. 1010, 1014 (S.D. Tex. 1992) (*Citing J. M. Blythe Motor Lines Corp. v. Blalock*, 310 F.2d 77,78 (5th Cir. 1962)).

Here, pursuant to federal procedural law, Petitioner failed to raise the existence of a material fact regarding the tolling of the Texas statute of limitations. *McLaren v. Imperial Cas. and Indem. Co.*, 767 F.Supp. 1364, 1378 (N.D. Tex. 1991). Nor could he have done so. Under Texas and federal summary judgment standards, his admission he bought-out other Lincoln shareholders to remedy the acting in control charges lodged against him was taken as true. He cannot now revoke his admission to advance the metaphysical hypothesis his purchase of such stock "could have been" a mere business opportunity with no nexus to the allegedly deficient change of control application. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (1986) (non-movant must do more than show metaphysical doubt, when record cannot lead rational trier to find for non-movant, there is no genuine issue for trial). Petitioner's "metaphysical" argument ignores both his pleading and the legally dispositive evidence.

Finally, and importantly, it is well-settled that reviewing courts interpret the consequences to be given the undisputed facts surrounding a plaintiff's claim. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 472 (1984). In this instance, both the district court and the Court of Appeals determined, from the undisputed facts, the legal consequence of limitations upon Petitioner's claim. The application of the statute of limitations, under the Texas legal injury rule, was a legal determination. *Moreno*, 787 S.W.2d at 351 (*Citing Fernandi v. Strully*, 34 N.J. 434, 173 A.2d 277, 235 (1961)); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988); *Seibert v. General Motors Corp*, 853 S.W.2d 773 (Tex. Ct. App. 1993). Both the federal and state courts are filled with litigants who dispute the legal determination made on their case facts. *See Sutherland v. Caballero*, 759 S.W.2d 945, 946 (Tex. 1988) (where plaintiff stated

discontent over attorney's work when performed, it is not necessary to decide if cause accrued at time of later alleged discovery); *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528 (9th Cir. 1985) (affirming summary judgment on limitations, although plaintiff urged recent notice of condition where facts demonstrated reasonable person must have known of condition prior in time); *see also Tyler v. Vickery*, 517 F.2d 1089, 1094 (5th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976). The instant situation is no different.

CONCLUSION

This is a simple negligence case between nondiverse Texas citizens under Texas law. Although Petitioner disagrees with the Court of Appeals' decision, he fails in this portion of the case involving the Law Firm to present a question of such public importance to warrant this Honorable Court's consideration. The Court of Appeals, which is in the best position to determine local law, properly determined Petitioner is time-barred under Texas jurisprudence. The undisputed facts and Petitioner's own admissions, taken as true on summary judgment, establish the legal consequence Petitioner filed a stale claim. That he can advance metaphysical doubts contrary to his pleading and the evidence does not change such consequence.

For all these reasons, this Honorable Court should sever this portion of the Petitioner's case and deny the petition for writ of certiorari as to the Law Firm.

Respectfully submitted,

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No. 93-955

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN S. BEESON, ET AL., PETITIONERS

v.

PHILLIPS, KING AND SMITH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1823(e) (Supp. IV 1992) and this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), bar the assertion of claims against a receiver for a failed depository institution where the claims were asserted in lawsuits filed against the institution before its failure, but the facts necessary for evaluation of the claim were not contained in records of the institution at the time of its failure.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-955

JOHN S. BEESON, ET AL., PETITIONERS

v.

PHILLIPS, KING AND SMITH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 995 F.2d 611. The opinion of the district court (Pet. App. B1-B10) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1993. A petition for rehearing was denied on September 15, 1993. Pet. App. C1-C2. The petition for a writ of certiorari was filed on December 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Although the appendices to the petition are unpaginated, we refer for convenience to each appendix as if it were separately paginated.

STATEMENT

1. On January 5, 1985, First South Savings Association made a loan to petitioners and a number of other individuals in the amount of about $5.4 million, evidenced by a series of promissory notes that were secured by, among other things, shares of common stock in Lincoln Savings and Loan Association, an institution in Miami, Florida. The investors[2] used the funds to purchase a controlling interest in Lincoln Savings. In 1987, the Federal Home Loan Bank Board (the Board) determined that the purchase and ownership of Lincoln Savings by the investors violated applicable regulations. Because of that determination, the Board required petitioners and some of the other investors to withdraw from participation in Lincoln's affairs. See Pet. App. A2-A3, B1-B2.

After petitioners failed to make timely payments on the First South notes, First South accelerated the date of maturity of the notes and then, in January of 1989, filed a number of lawsuits in the state courts in Harris County, Texas, seeking to enforce the notes against the investors. On February 2, 1989, petitioners and some of the other investors responded by filing a separate state-court suit against First South and the lawyers who had represented the investors in the transactions (a group of the private respondents that petitioners collectively describe as the Law Firm, see Pet. 3). That suit contended that First South and the Law Firm fraudulently induced the investors to accept the loan from First South by concealing knowledge of the regulatory problems that

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[2] For convenience, we refer collectively to petitioners and the other individual borrowers as the investors.

led to the Board's orders requiring petitioners and some of the other investors to remove themselves from management of Lincoln Savings. See Pet. App. A3-A4.

2. On March 15, 1989, the Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) conservator of First South. On April 14, 1989, the Federal Deposit Insurance Corporation (FDIC), acting on behalf of FSLIC, removed the actions previously instituted by the institution to the United States District Court for the Southern District of Texas. On August 9, 1989, the Resolution Trust Corporation replaced FSLIC as conservator of First South, pursuant to Section 501(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 369 (codified in relevant part at 12 U.S.C. 1441a(b)(3)(A) (Supp. IV 1992)).[3] See Pet. App. A4.

3. On April 27, 1992, the federal district court granted the RTC's motion for summary judgment in its suit to enforce the notes against the investors. Pet. App. B1-B10. Although petitioners raised the defense of fraudulent inducement that was the basis for their separate state-court lawsuit, the district court rejected that claim, reasoning that any such defense would be "barred by the doctrine established in *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942)." Pet. App. B4.

4. The court of appeals affirmed. Pet. App. A1-A20. The court accepted the district court's conclusion

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[3] The Resolution Trust Corporation subsequently was appointed receiver of First South. References in this brief to the RTC refer to the Resolution Trust Corporation acting as receiver of First South.

that the *D'Oench, Duhme* doctrine bars petitioners' claims. Pet. App. A5-A7. It noted petitioners' argument that the RTC was not a holder in due course because the notes were not negotiable, but explained that "the *D'Oench, Duhme* doctrine may defeat [petitioners'] defenses to collection regardless of negotiability." *Id.* at A6.

The court rejected petitioners' argument that the *D'Oench, Duhme* doctrine could not bar their claims because those claims had been asserted in petitioners' state-court lawsuit before the failure of the institution. The court explained that mere notice of the existence of the defense was not sufficient to allow petitioners to bring their claim against the receiver:

> [T]he defense is barred because, although the [RTC] may have been put on notice o[f petitioners'] defense, the defense itself cannot be supported by the records of the bank. Were we to hold otherwise, federal and state banking authorities would be required to speculate as to the outcome of various lawsuits pending against the bank where such outcomes depend on oral testimony of bank officials. Such uncertainty is precisely what *D'Oench, Duhme* seeks to avoid.

Pet. App. A7.

ARGUMENT

Petitioners argue (Pet. 22-40) that the court of appeals erred in upholding the applicability of the *D'Oench, Duhme* doctrine[4] to bar their defenses to collection on the notes.[5] That claim is meritless.

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[4] Petitioners do not suggest that there is any distinction relevant to this case between the judicial *D'Oench, Duhme*

1. Petitioners argue at length (Pet. 22-35) that the RTC could not be a holder in due course of their notes because those notes were nonnegotiable. The court of appeals, however, did not decide that question, and it is therefore not properly before the Court. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).[6]

In any event, the benefits of holder-in-due-course status are entirely separate from the benefits of the *D'Oench, Duhme* doctrine. Holder-in-due-course pro-

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doctrine and its statutory counterpart in 12 U.S.C. 1823(e) (Supp. IV 1992). Although the opinion of the court of appeals referred only to the judicial doctrine, the RTC did rely on Section 1823(e) in its brief in the court of appeals. See RTC C.A. Br. 28-33. In our view, petitioners' defenses are barred by Section 1823(e) for substantially the same reasons their defenses are barred by *D'Oench, Duhme*. The RTC is entitled to rely on Section 1823(e) even though that provision on its face refers only to the FDIC. See 12 U.S.C. 1441a(b)(4)(A) (Supp. IV 1992) (RTC "shall have the same powers and rights to carry out its duties [where it was appointed receiver for a failed savings and loan institution between December 31, 1988, and October 1, 1993] as the Federal Deposit Insurance Corporation has under sectio[n] * * * 1823 of this title.").

[5] Petitioners also challenge (Pet. 13-21) a holding of the court of appeals related to the statute of limitations on petitioners' claims against some of the private respondents. Because that challenge would not alter the rights of the RTC even if it were successful, this brief does not address that question.

[6] Moreover, that argument would be relevant only if holder-in-due-course status were relevant to the RTC's reliance on *D'Oench, Duhme*. Although the heading of the argument on page 35 of the petition suggests that petitioners believe that the lack of holder-in-due-course status in itself defeats the RTC's reliance on *D'Oench, Duhme*, the text of the petition does not make such a contention, but instead argues that *D'Oench, Duhme* does not bar petitioners' defenses. See Pet. 37-38.

tections arise out of principles of state law, generally codified in the Uniform Commercial Code (and frequently adopted, with appropriate modifications, as federal common law[7]), which in certain cases prevent the maker of a promissory note from interposing personal defenses against collection of the note when it has been transferred to a party other than the original payee. See Tex. Bus. & Com. Code Ann. § 3.305 (Vernon 1967); see generally James J. White & Robert S. Summers, *Handbook of the Law Under the Uniform Commercial Code* ch. 14, at 550-577 (1980). The *D'Oench, Duhme* doctrine, by contrast, is a rule of federal common law articulated by this Court, designed to provide special protection to federal receivers, above and beyond whatever protections they might receive under general principles of commercial law. See *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 457 (1942) (describing "federal policy to protect [the FDIC] and the public funds which it administers"). Hence, the availability—or unavailability—of holder-in-due-course status has no bearing on the merits of the RTC's reliance on *D'Oench, Duhme.*[8]

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[7] See, *e.g.*, *Campbell Leasing, Inc.* v. *FDIC*, 901 F.2d 1244, 1248-1250 (5th Cir. 1990) (adopting a federal common law holder-in-due course rule); *FDIC* v. *Wood*, 758 F.2d 156, 159-162 (6th Cir.) (same), cert. denied, 474 U.S. 944 (1985).

[8] The Court recently denied another petition that argued that the FDIC could not rely on *D'Oench, Duhme* when it was not a holder in due course. *Century Centre Partners, Ltd.* v. *FDIC*, 113 S. Ct. 2997 (1993). Pages 5-9 of our brief in opposition in that case (No. 92-1650) summarize the consistent holdings of the courts of appeals recognizing the distinction between holder-in-due-course status and the protections

2. Petitioners briefly argue (Pet. 38-40) that their defense of fraudulent inducement is not vitiated by the *D'Oench, Duhme* doctrine. First, they contend (Pet. 38-39) that the defense was reflected in the records of the institution, relying on the lawsuit, asserting that claim, that was pending at the time the institution failed. As the court of appeals explained, however, the existence of the lawsuit could not possibly have caused the records of the institution to reveal that claim to the regulators in the sense required by *D'Oench, Duhme*, because the validity of the claim depended not on the terms of any documents in the records of the institution, but on the oral statements and mental impressions of the institution's officers at the time the transaction was closed. Pet. App. A7; cf. *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987) (noting that the purpose of the statutory codification of *D'Oench, Duhme* was "to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets").

Petitioners also contend (Pet. 39-40) that their defense is viable because it involved "fraudulent concealment," rather than "a personal defense." That contention is foreclosed by this Court's decision in *Langley*, 484 U.S. at 93 ("We conclude * * * that neither fraud in the inducement nor knowledge by the FDIC is relevant to [Section 1823(e)]'s application.").[9]

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recognized in *D'Oench, Duhme*. We have provided a copy of our brief in *Century Centre* to counsel for petitioners.

[9] The question before the Court in *Langley* involved the interpretation of Section 1823(e), but the opinion relied heavily on the Court's understanding of *D'Oench, Duhme* and did not suggest that the common-law *D'Oench, Duhme* doctrine would be treated any differently. See, *e.g.*, 484 U.S. at 92-93.

Although petitioners contend (Pet. 39) that their claim is not foreclosed by *Langley* because it "is not a condition on repayment of the [n]otes," the only claim presented by the RTC to the district court was a claim for payment of the notes. Hence, if petitioners' defense does not establish a condition defeating their obligation to repay the notes, it is not relevant to the suit at all.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners' suggestion (Pet. 40) that *Langley* is inapplicable because the notes in this case were not negotiable is meritless for the reasons discussed in Point 1, *supra*.